ADDENDA

TO

THE FIRST EDITION

OF A

COMPENDIOUS SYSTEM

OF THE

BANKRUPT LAWS,

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NAMES OF CASES.

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CHAP. I.

ALLAN *v.* HARTLEY.

Mich. 25 *G.* 3. *B. R.*

IN an action brought by *Allan* and others, as aſſignees of *Marlar*, a bankrupt, together with *Down* ſurviving partner of *Pell* againſt *Hartley* and *Francis*, upon a bill of exchange due from the defendants to the houſe of *Marlar*, *Pell*, and *Down*, an objection was taken at the trial to the mode of proving the aſſignees of *Marlar* intitled to join in this action with *Pell*, the ſolvent and ſurviving partner. To ſupport their right they firſt produced a commiſſion againſt *Marlar*, *Stewart*, and *Boyd*, as partners, but that failed them, becauſe on the evidence it appeared that the commiſſion as to *Boyd* was fraudulent, he not having committed any act of bankruptcy but by contrivance. The plaintiffs next produced a commiſſion againſt *Marlar* and *Stewart* only, to which it was objected that there was no ſuch partnerſhip, the firm being *Marlar*, *Stewart*, and *Boyd*. The plaintiffs then offered in evidence a plea in an action brought three years before upon the ſame bill againſt the preſent defendants, in which they had pleaded that *Marlar*

was a bankrupt, and therefore the action not maintainable by *Marlar*, *Pell*, and *Down*. To this plea there had been a demurrer, but upon the argument the parties conſented that no judgment ſhould be given, and the plaintiffs diſcontinued. It was contended by the plaintiffs counſel that the defendants having pleaded that *Marlar*, became a bankrupt, and the demurrer having admitted that fact, it was evidence againſt the ſame defendants, being in truth their own allegation. Mr. Juſtice *Buller* who tried the cauſe nonſuited the plaintiffs. The court was moved to ſet aſide the nonſuit; and after hearing the arguments of counſel, Lord *Mansfield* ſaid, the plaintiffs claim as aſſignees, and to ſupport their claim they ſet up two commiſſions. There is no doubt there may be a commiſſion againſt one partner ſeparately, without making the reſt of the partners bankrupts. So there may be a commiſſion againſt all the partners in a houſe, and under ſuch commiſſions both the joint and ſeparate eſtate will be aſſigned, and the different claſſes of creditors will have the ſhares allotted to each. But the objection to one of the preſent commiſſions is, that it was taken out againſt three partners, and only two are found to have committed acts of bankruptcy. Such a commiſſion is void to all purpoſes, for it cannot be void as to one and valid as to the reſt, and no inſtance is cited to the contrary. The objection to the other is, that it is a commiſſion againſt two of three partners. A commiſſion may be joint or ſeveral, but this is neither. On the ground of the plea, it appears that no judgment was given, and no uſe made of the plea. There is no caſe to ſhew that the pleadings of counſel are evidence of the facts alledged. An anſwer in chancery is evidence, for there it is preſumed a man ſpeaks upon deliberation, what is true and upon oath; but a bill is fictitious, it does not aver facts

facts as true, but ſuggeſts them, and calls for anſwers to aſcertain them. It may be withdrawn or amended, and decides nothing: let the rule for ſhewing cauſe why the nonſuit ſhould not be ſet aſide be diſcharged.

CHAP. II.

FOWLER *v.* BROWN.

Sittings at Weſtminſter, after Michaelmas Term, 1779.

Lord *Mansfield*, at *niſi prius*, ruled that the ſtatute of limitations does not prevent a creditor from taking out a commiſſion of bankruptcy, but extends only to the remedies by action mentioned in the ſtatute, but does not extinguiſh the debt, or take away any other remedy.

If a creditor takes a bill for his debt, which is drawn by the debtor upon a payee, who had not at that time, nor previous to the bill's becoming due, any effects of the drawer in his hands, this does not extinguiſh the original debt, although the creditor neglects to give notice of its being diſhonoured.

BICKERDIKE *v.* BOLLMAN.

1 *Term Rep.* 405.

The jury found a verdict for the plaintiff ſubject to the following caſe: That *Reichard* the bankrupt, committed an act of bankruptcy in the middle of *Auguſt*, 1784, and in the ſame month the bankrupt was indebted to *Greatrix* and Co. the petitioning creditors, 115 *l.* 3 *s.* 8 *d.* On the 15th of *September*, 1784, the bankrupt drew a bill

for 20 *l.* on the defendant, who then and till the "time of the bankruptcy, and of the bill becoming due, was a creditor of the bankrupt," payable to *Greatrix* and Co. two months after date, and paid the ſame to them, on account of their ſaid debt, which bill was preſented for payment on the 18th of *November* following, and diſhonoured; no notice of the non-payment of the bill was given by *Greatrix* and Co. to the bankrupt, or left at his houſe; *Greatrix* and Co. received the bill at *Mancheſter*, on the 24th of *November*, between the hours of eleven and twelve at noon, but the poſt goes from *London* to *Mancheſter* in three days; the bankrupt then reſided at *Mancheſter*, but in general ſecreted himſelf, and particularly on market days after the 20th of *November*, on which day a commiſſion of bankrupt iſſued againſt him, and he was declared a bankrupt at *Mancheſter*, under that commiſſion, in the afternoon of the 24th of *November*, but at what hour did not appear, and that commiſſion was afterwards ſuperſeded, and another commiſſion was iſſued on the petition of *Greatrix* and Co. The queſtion for the opinion of the court was, whether the debt proved to be due to them under the circumſtances abovementioned, was ſufficient to ſupport that commiſſion.

Aſhhurſt, J.—As to the general rule, it has never been diſputed that the want of notice to the drawer, after the diſhonour of a bill is tantamount to payment by him, but that rule is not without exceptions, and particularly in the caſe mentioned by the plaintiff's counſel, that notice is not neceſſary to be given where the drawer has no effects in the hands of the drawee, for it is a fraud in itſelf, and if that can be proved, the notice may be diſpenſed with. In this caſe, it appears, that at the time of drawing the bill, the drawer ſo far from having

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ing any effects in the hands of the drawee, was actually indebted to him to a large amount. But even admitting this to be a general rule, without any exception, it was certainly introduced for the benefit of the drawer. Now every rule may be waived by the perſon for whoſe benefit it is introduced. Under the circumſtances of the preſent caſe, the drawer muſt be conſidered as having waived this benefit, becauſe the commiſſion is founded on that creditor's debt between whom and the drawer, this tranſaction has happened, and his ſubmitting to it is a waiver of the want of notice and an admiſſion of the debt, which admiſſion, the aſſignees have ſubſequently confirmed by bringing this action. Therefore, I think, that as the bankrupt himſelf has not choſen to take advantage of it by moving to ſuperſede the commiſſion, it does not now lie in the mouth of a third perſon to do ſo.

Buller, J.—The laſt point may be laid intirely out of the caſe, becauſe, unleſs the objection be well founded in the caſe of the bankrupt himſelf, it is immaterial to conſider how far it was competent for a third perſon to take advantage of it. The caſe of *Quantock* and *England* does not apply, there the queſtion was, Whether the third perſon ſhould be permitted to avail himſelf of the ſtatute of limitations? There might be a good reaſon for the diſallowing it in that caſe, becauſe the debt ſtill remained in conſcience. But here the queſtion is, Whether there was a ſufficient debt to ſupport the commiſſion at the time when it iſſued? The firſt point to be conſidered is, whether under theſe circumſtances it was neceſſary to give notice within as ſhort a time as could conveniently be done, that the bill was neither accepted or paid. I am of opinion, that no ſuch notice was neceſſary. On the ſecond trial of the cauſe of *Tindal*

and *Brown* before me at *Guildhall*, the jury told me they found their verdict for the plaintiff on the ground, that it had not appeared from the evidence that any injury had ariſen to the party from want of notice; in conſequence of which upon the ſubſequent trial, I told the jury that when a bill was accepted it was *prima facie* evidence, that there were effects of the drawer in the hands of the acceptor; the miſtake of the jury on the former occaſion had ariſen from their taking it for granted that the drawer had not been injured by the want of notice, becauſe he had not proved it, whereas that proof lay on the plaintiff to produce. And upon my mentioning this matter to the court, they thought that if there were no effects in the hands of the acceptor, that would vary the queſtion very much; as the drawer could not be hurt. The law requires notice to be given for this reaſon, becauſe it is preſumed that the bill is drawn on the acceptor on account of his having effects of the drawer in his hands, and if he has notice that the bill is not accepted or not paid, he may withdraw them immediately; but, if he has no effects in the other's hands, then he cannot be injured for want of notice. Soon after I ſat on this bench, I tried a cauſe at *Guildhall* on a bill of exchange, which was either drawn or accepted by a perſon reſiding in *Holland*, and a full ſpecial jury under my directions found a verdict for the plaintiff, notwithſtanding no notice had been given to the drawer, of the bill's having been diſhonoured, becauſe he had no effects in the hands of the perſon on whom the bill was drawn. That verdict never was objected to, and if it be proved on the part of the plaintiff that from the time the bill was drawn till the time it became due, the drawer never had any effects of the drawee in his hands. I think notice to the drawer

drawer is not neceſſary, for he muſt know whether he had effects in the hands of the drawee or not, and if he had none, he had no right to draw upon him and to expect payment from him, nor can he be injured by the non-payment of the bill or the want of notice, that it has been diſhonoured. On theſe grounds, I think, the petitioning creditor's debt was ſufficient to ſupport the commiſſion; beſides, in the preſent caſe, as the plaintiff's counſel have truly argued, the queſtion is not whether an action could be maintained on the bill itſelf, but whether the want of notice extinguiſhes the debt? As to which, the caſe is this, *A.* not having any effects in *C.*'s hands, draws a bill of exchange for 100 *l.* on him, in favour of *B.* for value received. Now if *C.* does not accept, and *B.* does not give notice to *A.* there is an end of the bill: then how does the caſe ſtand? *A.* has 100 *l.* of *B.*'s in his hands without any conſideration, which therefore *B.* may undoubtedly recover in an action for money had and received.

CRISP *v.* PERRITT.

9th June, 1743, *C. P.*

On the 1ſt of *February*, *Perritt* ſued out a commiſſion againſt *William Criſp* of *Chelſea*, dealer in wines and chapman, and on the 2d, ſame month, he was declared a bankrupt by the acting commiſſioners.

On the 15th of the ſaid month, *Criſp* preferred his petition to the Lord Chancellor, alledging, that he was not indebted to *Perritt* on his ſeparate account above 6 *l.* but admitted he the ſaid *Criſp*, together with *Edward Burnaby* and *James Barbut*, eſq. as co-partners of *Ranelagh Houſe*, were all

three jointly indebted to the ſaid *Perritt* for plaiſterers work, but he did not know in what ſum; that he had not committed any act of bankruptcy, and therefore prayed that the ſaid commiſſion might be ſuperſeded.

On the hearing, the Lord Chancellor ordered, that upon *Criſp*'s paying 100*l.* into the bank, in the name of the accountant-general, the major part of the commiſſioners ſhould make a proviſional aſſignment of the ſaid bankrupt's eſtate to an aſſignee to be appointed by them, and that the parties ſhould proceed to a trial at law in *London*, the then next *Eaſter* term, or at the ſittings next after in the court of Common Pleas in an action of trover to be brought by the ſaid *Criſp* againſt ſuch aſſignee for ſome part of the goods ſeized by virtue of the ſaid commiſſion, and that all further proceedings under the ſaid commiſſion, except the making the ſaid aſſignment, ſhould be ſtayed until after the ſaid trial. The proviſional aſſignment was accordingly made to the defendant *Perritt*.

On the 9th of *June* 1743, in purſuance of the ſaid order, the action came on to be tried before Lord Chief Juſtice *Willes*, when it was proved that the ſaid *Criſp* was a trader, and had committed an act of bankruptcy, and that he and his two partners, before the ſuing out of the ſaid commiſſion were jointly indebted to the petitioner *William Perritt* in 426*l.* and it not being proved that the ſaid *Criſp* owed the petitioners any ſeparate debt; Lord Chief Juſtice *Willes* doubted whether a ſeparate commiſſion againſt one partner for a joint debt due from him and his other partners could be regularly iſſued; and therefore directed a verdict to be found for the plaintiff, ſubject to the opinion of the Court of Common Pleas upon that point. The caſe was argued in the following *Michaelmas* term, and a ſecond time in *Hilary*.

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On the argument of the caſe it was principally inſiſted by *Criſpe*'s counſel, that as an action at law did not lie, the commiſſion was irregular, and they defied the defendants to ſhew that ſuch a commiſſion was ever iſſued; but on a ſecond argument, the following precedents were produced.

Ex parte CARUTHERS.

"*John* and *Patrick Crawford* were merchants "and co-partners, and became indebted to one "*Caruthers* in 1201 *l.* 16 *s.* 8 *d.* A commiſſion "iſſued againſt *Patrick* only, on a debt due from "him and partners. *Caruthers* petitioned Lord "*Talbot*, ſtating theſe facts, and that *Patrick* had "obtained his certificate which was then lodged "in order to be paſſed by the Chancellor; and "for this ſuppoſed irregularity in the commiſſion "it was prayed the certificate might not be allow-"ed. His lordſhip declared, that where one part-"ner commits an act of bankruptcy, and the other "not, a commiſſion will go againſt him, for he "owes the debt, and diſmiſſed the petition."

Ex parte UPTON.

"*Henry Hewett* and *William Ralphſon*, were "merchants and partners, *Hewett* lived in *London*, "and *Ralphſon* at *Venice*, and became juſtly in-"debted to *John Upton: Hewett* committed an "act of bankruptcy, *Upton* ſtated the facts ſpe-"cially to Lord *Macclesfield* and obtained a com-"miſſion againſt *Hewett* only."

The Chief Juſtice was of opinion that the defendant's counſel had fully anſwered the challenge, and declared theſe two caſes were in point, and *that a commiſſion was to be conſidered as an execution, and not as an action*; and after taking notice of the

great inconvenience and prejudice it would be to trade, in caſe ſuch commiſſions were not allowed, he by conſent of all the other Judges pronounced judgment, and declared that the commiſſion was regularly iſſued, and that a verdict ſhould be entered up for the defendant.

DE GOLLS *v.* WARD.

4 *Brown's Parl. Ca.* 327.

Upon an appeal from the decree in *De Golls* v. *Ward* to the Houſe of Lords, a queſtion was put to the Judges, whether the commiſſion of bankruptcy iſſued on the 20th *November* 1730, againſt *John Ward*, on the petition of *George Sureties*, was good and valid in law.

The Judges having had ſeveral days to conſider of this queſtion, and having had two meetings upon it, all of them attended on the 23d *February* 173⅓, in the Houſe of Lords, and being agreed in opinion, the Lord Chief Juſtice *Lee* ſaid, that as the commiſſion iſſued when the old ſtatutes relating to bankrupts were in force, they had conſidered it upon the foot of thoſe old ſtatutes, and that they were all of opinion that *George Sureties being a creditor at the time the commiſſion iſſued*, that therefore the commiſſion is good and valid in law.

Upon which the decree of diſmiſſion was reverſed, and the Court of Chancery ordered to proceed to hear the cauſe upon the merits.

Ex parte WAINMAN.

21*ſt October*, 1738.

And in Ex parte *Wainman*, 21 *October* 1738, it appeared that the petitioning creditor's debt conſiſted

siſted of 94*l* 3*s* 9*d*. due to them in their own right before the act of bankruptcy was committed, and 6*l*. 6*s*. on a note of hand due alſo before the act of bankruptcy to another perſon, but not endorſed over to the petitioning creditor till after the act of bankruptcy committed.

Mr. Attorney General argued there was not 100*l*. debt due to the petitioning creditor at the time the act of bankruptcy was committed, the note for 6*l*. 6*s*. not being endorſed to him till a few days before the commiſſion was applied for.

Lord Chancellor. The Judges in the caſe of *De Golls* and *Ward* were of opinion upon the foot of the *old acts*, that it was ſufficient if the debt were due at the time the commiſſion iſſued; but had the caſe been on the *new acts*, the Judges would have been of another opinion; the new act diſcharging bankrupts from all the debts they owed at the time they became bankrupt.

CHAP. III.

CORBET *v.* POELNITZ, *and* ANN *his Wife.*

1 *Term Rep.* 5.

The declaration ſtates that the defendant *Ann*, before her intermarriage with Baron *Poelnitz*, was the wife of Lord *Percy*, that by mutual agreement a ſeparation took place, and the defendant *Ann* had a competent maintenance of 1600*l*. *per annum* ſettled on her by deed. The declaration then ſtates that afterwards the defendant *Ann* before her intermarriage with the defendant Baron *Poelnitz*, and whilſt ſhe was ſo *covert* with the ſaid Lord *Percy*, and alſo whilſt ſhe ſo lived ſeparate and apart from the ſaid Lord *Percy*, and alſo whilſt her

her ſaid maintenance from the ſaid Lord *Percy* was duly ſecured and paid to her, to wit, on the 29th *November* in the year 1776, in conſideration that the plaintiff at the ſpecial inſtance and requeſt of the ſaid defendant *Ann*, for and in conſideration of the ſum of 900 *l.* paid by one *Abraham Chambers* to the ſaid *Ann* had become held and firmly bound together with the ſaid *Ann*, to the ſaid *Abraham Chambers* by their joint and ſeveral bond in 1800 *l.* conditioned for the payment of an annuity of 150 *l.* during the natural life of the ſaid *Ann*, and had alſo together with the ſaid *Ann* executed a warrant of attorney for confeſſing judgment on the ſaid writing obligatory for 1800 *l* and coſts of ſuit, at the ſuit of the ſaid *Abraham Chambers*, undertook and to the ſaid plaintiff promiſed faithfully to indemnify him againſt the ſaid bond and warrant of attorney, that afterwards, and after the ſaid promiſe, the marriage between the ſaid Lord *Percy* and the ſaid defendant *Ann* was diſſolved by act of parliament, by which the ſum of 1600 *l. per annum* was continued and ſecured to her for her life, that afterwards, in *March* 1780, the ſaid *Ann* was married to the defendant Baron *Poelnitz*, that afterwards and after the marriage of the ſaid *Ann* with the ſaid Baron *Poelnitz*, to wit, on the 29th *Auguſt* 1780, 262 *l.* 10 *s.* became payable to the ſaid *Abraham Chambers* by virtue of the condition of the ſaid bond for one year and three quarters, ending on the ſaid 29th *Auguſt* 1780, that afterwards the ſaid *Abraham* cauſed to be entered of record upon and by virtue of the ſaid warrant of attorney, a judgment in his majeſty's court of king's bench at *Weſtminſter*, as of *Trinity* term in the 20th year of the preſent king, at the ſuit of the ſaid *Abraham* againſt the ſaid *Ann* and the ſaid plaintiff, upon the ſaid writing obligatory for the ſaid ſum of 1800 *l.* and 16 *s* for coſts, whereupon

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the plaintiff, to prevent his being taken in execution upon the ſaid judgment, was obliged to pay the ſaid *Abraham Chambers* the ſaid ſum of 262 *l.* 10 *s.* together with 5 *l.* 19 *s.* for coſts, yet that the ſaid Baron *Poelnitz* and *Ann* had not paid him the ſaid plaintiff the ſaid ſum of 262 *l.* 10 *s.* and 5 *l.* 19 *s.* or indemnified him againſt the payment thereof, *&c.*

Lord *Mansfield*—The facts lie in a very narrow compaſs, and admit of no doubt; Lord and Lady *Percy* by a deed mutually agree to live ſeparate; neither can break this agreement; and a large maintenance is ſettled on her for her own ſeparate uſe, as a *feme ſole*, to all purpoſes, the ſame as if ſhe were unmarried. The claim upon which this action is founded is of a meritorious nature: Lady *Percy* applied to the plaintiff, he conſidered her as a *feme ſole* and became ſurety for her, ſhe promiſed to indemnify him, and the contract was concluded under a firm belief on both ſides, that it was perfectly valid and binding. In juſtice then ſhe ought to pay the debt; but then to encounter this, there is a rule of poſitive law which is to be adhered to, and preferred, though in particular caſes it may ſeem productive of hardſhip and oppreſſion; by this general rule, a married woman can have no property real or perſonal, her contracts are intirely and univerſally void, for her contracts even for neceſſaries are the contracts of her huſband, ſhe cannot be ſued or be taken in execution. This is the general rule: but then it has been properly ſaid, that as the times alter, new cuſtoms and new manners ariſe, theſe occaſion exceptions, and juſtice and convenience require different applications of theſe exceptions, within the principle of the general rule.—— The queſtion then is, Whether it is ſo here? Whether under the circumſtances of the preſent caſe,

caſe, a married woman ſhould or ſhould not be ſued ſolely? Exceptions have been made in this very caſe. Where a huſband is in exile, or has abjured the realm, and credit has been given to the wife alone; juſtice ſays ſhe muſt pay, for the huſband cannot be ſued. So it is in the caſe of tranſportation, though the caſe is not exactly the ſame; for there the abſence is only temporary, becauſe the huſband may come over and be ſued afterwards. Why then is it ſo eſtabliſhed? Becauſe the wife acts as a ſingle woman, gains credit as ſuch, receives the benefit, and ſhall be liable to the loſs. Where ſhe has an eſtate to her ſeparate uſe, in juſtice ſhe ought to be liable to the extent of it. In modern days, a new mode of proceeding has been introduced, and deeds have been allowed, under which a married woman aſſumes the appearance of a *feme ſole*, and is to all intents and purpoſes capacitated to act as ſuch. In the antient law there was no idea of a ſeparate maintenance; but when it was eſtabliſhed, what ſaid the courts? That the huſband ſhall not be liable even for neceſſaries; and they ſaid ſo, becauſe convenience and juſtice required it. In the preſent caſe no diſtinction has been taken at the bar, whether ſuppoſing Lady *Percy* to be liable, her ſecond huſband is ſo; and they have done right, for ſo he muſt certainly be. The only queſtion then is, whether a woman married, but living ſeparate from her huſband, by agreement, having a large ſeparate maintenance ſettled on her, continuing notoriouſly to live as a ſingle woman, contracting and getting credit as ſuch, and the huſband not being liable ſhall be ſued as a *feme ſole*. I think ſhe ſhould: it is juſt that it ſhould be ſo. I am of opinion the preſent caſe is quite determined by the two late ones which have been cited, which do not reſt upon one or two circumſtances

ſtances as contended; but upon the great principle which the court has laid down, "That where "a woman has a ſeparate eſtate, and acts, and "receives credit as a *feme ſole* ſhe ſhall be liable "as ſuch." There is the ſame juſtice in this caſe; nor can I ſee any difference between them.

Willes, J. concurred.

Aſhhurſt J.—It ſeems to me, that to decide the preſent queſtion, we need only conſider the reaſons on which the incapacities of a *feme covert* are founded, not on the ſame ground as thoſe of an infant, whoſe diſabilities ariſe from the want of diſcretion. But firſt, becauſe ſhe has no property. And ſecondly, becauſe it would be unreaſonable to permit a wife to affect the property of her huſband, except where he will not allow her neceſſaries, in which caſe, her contracts are the contracts of her huſband. Now where a woman has a ſeparate maintenance, and the huſband cannot be charged; it follows naturally that ſhe muſt, and if ſo, we cannot draw a preciſe line, and ſay ſhe ſhall be liable for this, and not for that, for her capacity ariſing from want of property being once removed, ſhe is, in my opinion, ſuable for all. But, if as was ſuppoſed, ſhe were only liable in reſpect of her ſeparate maintenance, ſhe could not be liable generally, but only ſo long as the maintenance continued, after the manner of an executor, as long as aſſets remain in his hands; that however cannot be; if ſhe exhauſt her whole fund, it is her own folly, but does not render her leſs liable. As to her being only liable in reſpect of her firſt ſettlement, ſuch a doctrine was never before contended; if ſhe be liable at all, ſhe is liable generally, and that not only for neceſſaries, but for all contracts. I think the other two caſes govern this, and that the rule for arreſting the judgment muſt be diſcharged, for ſhe gained a general capacity

city to contract debts, and conſequently the ſecond huſband takes them, for he takes her *cum onere*.

Buller, J.—The only conſiderable diſtinction to be found between this caſe and that of *Ringſtead* and Lady *Laneſborough*, is the non-reſidence of Lord *Laneſborough*; but that is intirely done away by what the court ſaid in *Barwell* and *Brooks*, that it made no ſort of difference whether the huſband was in *England* or not, for he was not liable; which was the great principle that influenced the deciſion, and not his local ſituation. Hence then we have only to conſider, whether it is poſſible to draw the line, that the wife ſhall only be liable for neceſſaries? The opinion of the two Judges in *Hatchet* and *Baddely* went wide of it, and it has never been much preſſed; but I think the objection has no force, for if ſhe has a power of contracting, it muſt be a general one. A diſtinction has been made as to the fund that is liable; and, it has been aſked, what if ſhe alien the whole. The argument however ſtops ſhort, for it ought to have ſhewn that the huſband would again become liable in that caſe, but there is no colour to ſay, that if the wife ſpends the whole of her ſettlement, her huſband ſhall be liable even for neceſſaries. As to the prudence of the meaſure, that is no ground on which the court can found their deciſion. In Lady *Laneſborough*'s caſe the only queſtion was, Whether ſhe could acquire a capacity to contract? It was determined that ſhe could, and therefore, as I think that caſe muſt govern the preſent, I am of opinion that the plaintiffs may recover.

Ex parte MEAR.

23*d July*, 1787.

A commiſſion of bankrupt iſſued 20 *December*, 1785, againſt *Frances Mear*, by the name of *Frances*, the wife of *Henry Mear*, of *Moſely*, in the pariſh of *Yardley*, in the county of *Warwick*, before her intermarriage known by the name of *Frances Piper*, of *Birmingham*, in the county of *Warwick*, Innholder.

Frances Mear, had before her marriage kept an inn in *Birmingham*, but had declined buſineſs on the 27 *December*, 1784, previous to the date of the commiſſion, and on the 14 *February*, 1785, had intermarried with *Henry Mear*.

The act of bankruptcy was proved before the commiſſioners to have been committed in *October*, 1784.

Mear and his wife, petitioned to ſuperſede the commiſſion, alledging that neither the petitioning creditor's debt, the trading, nor the act of bankruptcy could be proved, and alſo relying upon the illegality of the commiſſion, as having been iſſued againſt a married woman. The Lord Chancellor was of opinion that the commiſſion was illegally iſſued againſt the ſaid *Frances Mear*, upon the ground of her marriage, and therefore the commiſſion was ordered to be ſuperſeded without going into the other objections.

PARKER *v.* WELLS.

1 *Brown*, 494. 1 *Term Rep.* 34.

A writ of error was brought in the court of King's Bench, which was argued in *Michaelmas*

term, 1785: and on the 18th of *November*, Lord *Mansfield* delivered the unanimous opinion of the court, as follows.—The queſtion which ariſes upon this ſpecial verdict is, whether the plaintiff was a trader within the true intent and meaning of the ſtatutes concerning bankrupts?

The verdict ſtates a demiſe from the archbiſhop of *Canterbury*, in the year 1767, to *John Parker*, the father of the plaintiff, of an extenſive farm of 800 acres, in which there was a parcel of brick ground, for 21 years. He ſtates ſimilar demiſes to *John Parker*, the father of the plaintiff, prior to that in 1767; and alſo a ſubſequent ſimilar demiſe to the plaintiff in 1780. And ſtates that one *William Berand* for 20 years and more, before the year 1768, rented the ſaid parcel of brick ground from the ſaid *John Parker* the father, and made and ſold bricks there. That the ſaid *William Berand* died in the year 1768, and upon his death, the plaintiff took the ſaid brick ground into his own poſſeſſion, and then and there bought certain materials and neceſſary things, which were by the ſaid *William Berand*, in his life-time uſed in making bricks there at the valuation of 130*l.* and then and there made bricks and tiles of the earth there, and ſold them, and that during the time, the within named *John Dewey Parker* the plaintiff ſo held the ſaid land, he made bricks and tiles for ſale of the earth or clay ariſing from the brick grounds and bought ſand and fuel, which were neceſſary ingredients for converting the earth and clay into bricks and tiles. I ſhall make two queſtions; 1. whether upon this verdict *William Berand* was a trader? 2. if *William Berand* was a trader, whether upon this verdict the caſe of the plaintiff can be diſtinguiſhed, ſo as to make the plaintiff no trader. Brick-making for ſale abſtractedly conſidered is in fact carrying on a trade, and

ſeeking

ſeeking to live by the profits. Many things are neceſſary to be bought, which can only be paid by the money to ariſe from the ſale of the bricks. The credit is given to no viſible fund, but merely upon ſpeculation to the profits of the trade.

The objection is, that *William Berand* rented the brick ground, and conſequently then the bricks were the produce of his own land. From the authorities and the reaſon of the thing, I take the true diſtinction to be this. If a man exerciſes a manufacture upon the produce of his own land, as a neceſſary or uſual mode of reaping and enjoying that produce, and bringing it advantageouſly to market, he ſhall not be conſidered as a trader, though he buys materials or ingredients; as in the caſe of a farmer who makes cheeſe, though he buys runnet and ſalt; or where a man makes his own apples in cyder, though there is an expence attending the operation, many things to be bought, and perhaps ſome mixture neceſſary, but it is the uſual mode in the cyder counties in which the owners of orchards turn their apples to profit and bring them to market; or as in the allum caſe, where the operation was proved to be neceſſary, and the conſtant mode practiſed by all the proprietors of allum works; or in the caſe of coal mines, where raiſing them out of the pit is as neceſſary to the enjoyment of that ſpecies of produce, as reaping and threſhing is to the enjoyment of corn. But where the produce of the land is merely the raw materials of a manufacture, and uſed as ſuch, and not as the mode of raiſing the produce of land; in ſhort where the produce of the land is an inſignificant article, compared with the expence of the whole manufacture; there in truth he is, and ought to be conſidered as a trader. As this diſtinction turns upon the nature and manner of exerciſing the manufacture, and the motive with which it is carried on,

it depends ſo much upon the light in which a jury ſees the whole tranſaction, the law and fact are ſo blended together, that it is hardly poſſible to diſtinguiſh them, and agreeable to what Mr. Juſtice *Buller* did in the caſe *ex parte Harriſon*, I directed when the queſtion in this cauſe came on before me at *Croydon*, that if the plaintiff made bricks for the uſe of his own buildings, tho' he ſold what he did not uſe, that they ſhould not find him a trader, but if they thought that he carried on the trade for public ſale, merely with a view to the gain he expected to ariſe thereby, they might find him a trader; and a ſpecial jury upon that trial found him a trader. In this caſe *William Berand* took the brick ground with a view to carry on a trade for public ſale; the land produced nothing, the leaſe is merely a purchaſe of the clay, and juſt the ſame as if he had bought it by ſo much a load; he had nothing to do as a farmer, his ſole object was making bricks for ſale; therefore we think he muſt be conſidered as a trader. Second queſtion, whether the caſe of the plaintiff can be diſtinguiſhed, ſo as to make him no trader? Upon the death of *Berand* in 1768, he took poſſeſſion, paid for the ſtock, and carried on the trade in like manner, and made bricks for public ſale. He lived with his father, and had in fact a joint occupation of the farm with his father, but the father was the leſſee, and ſuffered the plaintiff to take the brick ground ſolely. The father had no concern in it, was liable to none of his debts upon that account, and therefore the farm and the brick ground were as diſtinct, after the plaintiff carried on the trade as they were in the time of *Berand*.—The plaintiff had no leaſe or intereſt in the farm till 1780, but from 1768 he is permitted by his father upon the death of *Berand* to come in his place, and carry on the trade of brick making for ſale, as *Berand* had done

done for many years. The leaſe in 1780 is immaterial. If he traded from 1768, that is ſufficient. During that time he occupies only an old brick kiln long uſed for public open ſale, and makes and ſells bricks accordingly. The plaintiff acted juſt as *Berand* had done, merely in the capacity of a common brickmaker for ſale. *Berand* rented the brick ground as the mode of buying the clay. Whether the plaintiff paid for the clay, or had it by gift from his father makes no difference as to the capacity in which he dealt, which we think that of a trader.

Upon a writ of error from the judgment of the court of king's bench, the following queſtions were put to the judges by order of the houſe of lords.

1ſt, Whether the finding on this verdict be ſufficient whereupon to give final judgment?

2dly, If the finding be inſufficient, what award ought to be made on ſuch finding?

3dly, If the finding be ſufficient, whether upon ſuch finding the plaintiff in error appears to be a trader within the true intent and meaning of the ſtatutes concerning bankrupts?

The Lord Chief Baron *Eyre* delivered the unanimous opinion of the judges preſent, upon the firſt queſtion in the negative: and upon the ſecond queſtion that a writ of *venire facias de novo* ought to be awarded, whereupon it was adjudged accordingly that the court of King's Bench, do award a *venire facias de novo*.

The plaintiff *Parker* did not proceed upon the *venire de novo*, but brought an action of trover againſt *Samuel Long*, *Daniel Richard*, and *William Pellat* and *John Wells*. To this the defendants pleaded the former action ſtill pending, and ſupported their plea with the uſual averments. Upon which an agreement took place between the parties that

this action ſhould not proceed, but that another ſhould be brought in the court of King's Bench, which was accordingly done. This laſt action came on to be tried by Mr. Juſtice *Buller*, and a ſpecial jury, 7th of *December*, 1787.

Mr. Juſtice *Buller*, previous to ſumming up the evidence told the jury, there were three queſtions for them to determine.

1ſt, Whether *Parker* carried on the trade of making and ſelling bricks and tiles for ſale, for the purpoſe of drawing a profit therefrom?

2d, How long he carried on trade for that purpoſe, Whether from the 23d of *June*, 1768, when *Berand* died, to the time of his abſconding, which was on the 7th *January*, 1783, or from what time to what time?

3d, Whether *John Dewey Parker*, was a joint occupier of the farm with the father, or the father had the ſole beneficial enjoyment of the farm to the time of his death?

1. The jury found that *John Dewey Parker* did carry on the trade of making bricks and tiles for ſale, for the purpoſe of drawing a profit therefrom.

2. That he carried on the trade for that purpoſe from the 23d of *June*, 1768, when *William Berand* died, to *Michaelmas*, 1778. That he ceaſed to make bricks on *Michaelmas*, 1778, and he alſo ceaſed to ſell them, on the ſame day.

3. That the father had the ſole enjoyment of the farm until the time of his death.

This finding was to be drawn up as a ſpecial verdict, but I have been informed by the gentlemen concerned, that as it appeared that Mr. *Parker* had left off brick-making before the petitioning creditor's debt accrued due, the defendants have waived a ſpecial verdict, and that a general one has been entered for the plaintiffs,

PATMAN v. VAUGHAN.

1 *Term Rep.* 572.

In the caſe of *Patman* v. *Vaughan*, it appeared in evidence, that the plaintiff had kept a public houſe for nine months, during which time he had ſold to three or four perſons about ſix gallons of ſpirits altogether. One of the inſtances was that having bought five gallons of ſpirits of one *Bennet*, he had deſired him to ſend two of the five into the country, to a perſon who had ordered it of him; it was alſo ſaid by his own ſervant, that if any perſon had ſent for liquor, he might have had it. Mr. Juſtice *Buller* left the queſtion to the jury, with this direction, that if they were of opinion that the plaintiff had endeavoured to make profit of his trading, and was ready to ſell to any perſon who applied to him, and not merely as a matter of favour; that then the quantum and extent of the trading, was immaterial; and they ſhould find for the defendant. The jury found for the defendant accordingly. *Aſhhurſt*, Juſtice, I do not now conſider the queſtion of law to be governed by the quantum of the trading, but I take the rule to be this, that where it is a man's common or ordinary mode of dealing; or where, if any ſtranger who applies, may be ſupplied with the commodity in which the other profeſſes to deal, and it is not ſold as a favour; any particular perſon ſo ſelling is ſubject to the bankrupt laws. *Buller*, J. the caſe of *Bartholomew* v. *Sherwood*, was much ſtronger than the preſent, on the trial of this cauſe I left the queſtion to the jury, with this direction, that if they were of opinion the plaintiff meant to ſell ſpirits

out of his houſe, and to get a profit by it, the quantity which he ſold was immaterial, and he muſt be conſidered as a trader. It was proved at the trial, that the plaintiff lived in the publick houſe only nine months, during the courſe of which time there could not be many inſtances adduced in evidence of his having ſold ſpirits out of the houſe, but I particularly directed the jury to advert to the circumſtance of there not being any one inſtance of any perſon who had applied to buy liquor having been refuſed. That is the great point, for as to the extent of the dealing, and the profit which he made, it is immaterial. For if a man makes a conſiderable profit, he is not likely to become a bankrupt; it is only in caſes where the profits of the trade are inconſiderable that ſuch an event is likely to take place. Now the circumſtances here were, that from the time when the plaintiff took this houſe, he was willing to ſell ſpirits to any perſon who applied, therefore though the time was ſhort, and the inſtances of his trading were few, yet I thought it proper to be left to the jury, and they found a verdict for the defendant.

BARTHOLOMEW v. SHERWOOD.

1 *Term Rep.* 573.

And in a cauſe tried before Mr. Baron *Eyre* at the Summer Aſſizes at *Oxford*, 1786, the plaintiffs as aſſignees brought an action of trover againſt the defendant, who claimed under an execution againſt the goods of the bankrupt, and the only queſtion was, Whether *Davis*, the ſuppoſed bankrupt, was a trader within the meaning of the ſtatutes concerning bankrupts? It was contended that he was a dealer in horſes; as to which it appeared in

evidence, that *Davis* at this time, and for a few years paſt had rented a conſiderable farm at *Whitechurch*, and that he kept two, occaſionally three teams of horſes, for the farming buſineſs. That previous to his taking this farm, he had lived with an uncle, during which time he attended ſeveral different fairs, and occaſionally bought and ſold horſes; that after he took this farm, there were ſeveral inſtances of his attending fairs, and of every now and then buying a horſe which was not calculated for the farming buſineſs, and which he conſtantly ſold again. It appeared that during the courſe of two years he had bought and ſold five or ſix horſes, in this manner, two of which had been ſold directly after he had bought them, for the ſake of a guinea profit, another was ſold again within three days. No evidence being offered to contradict this on the part of the defendant, the judge left it to the jury, on the plaintiff's evidence, and they found a verdict for the plaintiff. A motion was made for a new trial laſt *Michaelmas* term, which after argument was refuſed, and *Aſhburſt*, J. ſaid, it is admitted on the part of the defendant, that this was a matter of evidence, and proper for the conſideration of the jury; then if it were proper to be left to them, and there was no evidence to contradict it, they were bound to find as they did. The general principle is right, that a farmer, as ſuch, is not an object of the bankrupt laws; and if a farmer in the courſe of his buſineſs buys a horſe, and after uſing him for ſome time, ſells him again, that will not ſubject him to the bankrupt laws; but in this caſe the evidence is, that he bought horſes for the expreſs purpoſe of gaining by it. *Buller*, J. It appears by the evidence that there were many inſtances of the bankrupt's buying horſes which he could not uſe in the farming

ing buſineſs, and others which he bought for the expreſs purpoſe of ſelling again, whether there were more or fewer inſtances, was proper to be left to the conſideration of the jury. It is like the caſe of a vintner, who if he ſell only a dozen of liquor to particular friends, cannot be made a bankrupt, but if he is deſirous to ſell to every perſon who applies, that will ſubject him to the bankrupt laws; but in all theſe caſes the queſtion is, Whether the perſon buys and ſells with a view to make a profit by it, and that is proper to be left to the conſideration of the jury, here it was left to them, and they have found that *Davis* was a trader.

CHAP. IV.

RAIKES v. POREAU,

London Sittings after Trinity Term. 26 *G.* 3.

Raikes v. *Poreau*, was an action for money had and received, plea the general iſſue. The plaintiffs were the aſſignees of *Hervey*, and the queſtion in the cauſe was the time at which he became a bankrupt.—The evidence was that he left *England* in company with a young lady of about 16 years of age, who, as *Hervey* was a married man, refuſed to live with him as a miſtreſs, unleſs he took her abroad. The defendant who was a relation of the lady, and a creditor of the bankrupt followed them to *Holland*, and there obtained from him the bill for the amount of which this action was brought. The counſel for the defendants, contended, that the ſole motive of the bankrupt's leaving *England* was to effect his deſign upon the lady, and that the defendant followed them, not for

for the purpoſe of obtaining the bill, but of bringing back the lady.

Mr. Juſtice *Buller*, if it were neceſſary to ſay whether the bankrupt left the kingdom to delay his creditors, I think no great doubt can be entertained of it. The evidence of his clerk as to the bad ſituation of his affairs, and the bills which he was to have paid on the ſubſequent day clearly evince his intention. But this point it is now unneceſſary to decide, for it has been ſettled in *Woodier*'s caſe that if a man goes abroad though not with the intention of delaying his creditors, and in fact they are delayed, it is an act of bankruptcy. I do not know that this caſe has ever been over-ruled. It is in general of more importance that the law ſhould be ſettled, than what the law is. If I were now to lay down the law for the firſt time, I do not know that I ſhould do it in this manner. But here I am bound to conform to decided authority.—And the jury found a verdict for the plaintiffs.

Same point, Vernon v. Hankey.

COLKETT v. FREEMAN.

2 *Term. Rep.* 59.

Upon a rule to ſhew cauſe why a new trial ſhould not be granted, it appeared that at the trial the only queſtion that aroſe was concerning the act of bankruptcy alledged to have been committed by *Falch*, as to which the facts were as follows: *Falch* being in bad circumſtances on the evening of the 7th of *January*, 1786, expreſſed his concern to his clerk, and his fears that he ſhould not be able to anſwer a bill which would become payable

payable the next day, and desired him to come earlier than usual the next morning, and be in the way; in case the holder of that bill should enquire for him, to deny him. In fact, that bill-holder did call the next morning before nine o'clock, and presented a bill for payment, when the clerk gave him the answer as he was directed, that his master was not at home. Afterwards, however, in the course of that day, *Falch* appeared in public, and having procured some money from a friend whom he met, he sent for the bill and paid it before five o'clock on that day. The learned judge directed the jury to find their verdict for the plaintiffs, inasmuch as the act of bankruptcy was compleat by the denial of a creditor with intent to delay him, notwithstanding several of the jury, which was a special one, suggested to him at the time that by the practice of merchants in the city of *London*, the payer of a bill has the whole of the day on which it becomes due till five o'clock to pay it in. However, upon the judge's repeating to them his opinion upon the point of law, they found their verdict accordingly.

Ashhurst, J.—I have always understood the general rule to be, that where a trader commits an unequivocal act of bankruptcy, nothing that passes afterwards can explain it away. Where indeed the act done is in itself equivocal, there it may be explained by subsequent acts, as by the bankrupt's afterwards appearing in public, or the like. Then the only question here is, whether the act at the time it was done was a clear unequivocal act of bankruptcy? From the facts which have been stated it appears that the bankrupt could only order himself to be denied with a view to delay his creditors, for he himself thought that his circumstances were in a desperate situation at that time,

and

and that he ſhould not be able to fulfil his engagements, and directed his clerk to deny him when the bill-holder called, which was accordingly done early the next morning. This was a clear act of bankruptcy, and whatever might happen afterwards could not alter the caſe. It is true that if the payer of a bill of exchange diſcharge it before five o'clock, on the day when it becomes due, that will be a ſufficient payment in law, in order to prevent a proteſt, but that is not the queſtion here; what we are now to conſider is, whether the denial to a creditor, with a view to delay him, was a complete act of bankruptcy at the time? I am of opinion that it was, and I believe that this has been ſo held in ſeveral caſes.

Buller, J.—On account of a doubt ſtarted at the trial by ſome of the jury, which was a very reſpectable one, I was deſirous of taking the opinion of the court upon this caſe, although I myſelf entertained no doubt upon the ſubject. But if the reſt of the court are now clear that the law laid down by me was right, it will only be putting the parties to further and unneceſſary expence to grant a rule to ſhew cauſe. It appeared at the trial, that the bankrupt had given himſelf up as a loſt man the night before the morning in which the denial was proved; he was then in deſperate circumſtances, he had been getting money for ſome time before. in a manner not altogether to his credit, by buying goods of perſons for the purpoſe of turning them into money, who were afterwards obliged to come in as creditors under the commiſſion; ſuch was his general ſituation when the denial took place. The jury doubted whether that denial was an act of bankruptcy, becauſe the bill upon which the demand aroſe was paid before five o'clock on that ſame day on which it became due, and they deſired

desired to know whether in point of law the bankrupt had not the whole day to pay the bill? I told them that the rule mentioned by them, with respect to the time which the payer of a bill was allowed to discharge it in on the day on which it became due, was a good one, but that they were mistaken in the application of that rule to the present instance. That where the question was, what laches of the holder would discharge the indorser, there the former might wait to receive payment the whole of the day on which the bill became due: but that was with a different view. Here the case turned on a different question, Whether a denial of a creditor, with a view to delay him, though but for an hour, was not an act of bankruptcy? For though the words of the act 13 *Eliz. c.* 7. are "begin to keep house," yet on the construction of them it has always been held that a denial to a creditor, with a view to delay him, was an act of bankruptcy. And I told the jury, that if they were satisfied that the bankrupt denied himself at nine in the morning, with a view to delay his creditor, that was in itself a clear act of bankruptcy, and his afterwards appearing in public on that day, and paying the bill before five o'clock in the evening, could not purge that act once committed. A clear act of bankruptcy can in no case be explained. At the trial of this cause, a gentleman at the bar mentioned a case which had come before Lord *Mansfield* a few years ago, the circumstances of which were these; a bill having become due, and the drawer being pressed for payment, desired the holder to call upon him the next morning at a friend's house in *Bridge-street*, and he would pay him; the holder went accordingly, and was denied at the drawer's request. Upon being asked by his friend, if he was aware that he had been committing an act of bankruptcy, he

he answered with surprise in the negative, and said, that he did not mean to do so, and went afterwards and paid the bill. Lord *Mansfield*, in his directions to the jury told them, that if they were satisfied that the denial had been with a view to delay the creditor at the time, it was an act of bankruptcy, and if so, it could not be purged by paying the bill afterwards. The term of "purging an act of bankruptcy" is frequently perverted, and that has often been complained of by Lord *Mansfield*, who has on several occasions taken the opportunity of declaring, that it can only mean, that if the act done be in itself equivocal, other circumstances may be called in to explain it; but if the act be a clear unequivocal act of bankruptcy, it cannot be purged or explained away by subsequent circumstances.

Grose, J.—It seems to me that the directions of the learned judge were perfectly right, for the only question was, whether the denial was with a view to delay the creditor? That was the province of the jury to determine, and they have found by their verdict that it was; and in my opinion they have judged right. The direction therefore being right in point of fact, it would be a loss of time and an unnecessary encrease of expence to grant even a rule to shew cause.

COLKETT *and others, assignees of* FALCH *v.* FREEMAN *and another.*

London Sittings after Trinity Term. 27 *G.* 3.

The plaintiffs in an action of *Trover* claimed the goods, as having been assigned to the defendant by the bankrupt, after a secret act of bankruptcy committed on the 9th of *January*. A bill drawn upon

upon the bankrupt became due that day. He had been the preceding evening endeavouring to raiſe money to pay it, but without ſucceſs; when he ſaw the clerk of the holder coming in the morning, he deſired to be denied; and the clerk was accordingly told that the bankrupt was not at home. The bankrupt afterwards went out and got money ſufficient to diſcharge the bill, which he ſent to the holder before five o'clock in the evening, ſo that the bill could not be noted.

Buller, J. told the jury, that a denial, with intent to delay creditors, was an act of bankruptcy, that in this caſe the denial was undoubted, and the only queſtion was with reſpect to the intention.—That if they were of opinion, that the bankrupt, at the time of the denial, meant to delay the holder of the bill, the ſubſequent payment would not vary the caſe; for the only effect that could have, would be to render the intention leſs certain.

Mr. *Peters*, one of the ſpecial jury, expreſſed ſome doubts to the judge, and ſaid the circumſtance of the bankrupt going out immediately after the denial, in ſearch of money, very much inclined him to think that this was not an act of bankruptcy.

Buller, J. ſaid, that if, *at the time of the denial*, there was any intention to delay, it could not be purged away by any ſubſequent act, and all inconvenience might have been prevented by the bankrupt having ſeen the clerk, and telling him he was going in ſearch of money to pay the bill. A verdict was found for the plaintiffs.

An

KETTLE *and Others, Assignees of* EWING v. HAMMOND,

Sittings after Hilary Term, 7 G. 3.

An assignment of all a trader's effects for the benefit of all the creditors, has been held an act of bankruptcy, unless they all assent to the deed; accordingly in an action of trover against the sheriff who had levied an execution at the suit of one *Lee*, under a warrant of attorney given him by the bankrupt. To prove an act of bankruptcy, prior to the execution, the plaintiff's counsel relied on an assignment made by the bankrupt of all his effects to two of his creditors in trust for themselves and the rest, in consequence of a proposition made by the bankrupt at a meeting of his creditors and accepted by them. Lord *Mansfield* held such deed to be an act of bankruptcy as a fraud on the bankrupt laws, unless every creditor had concurred. And the plaintiff had a verdict.

ROUND *and Another* v. HOPE BYDE,

London Sittings after Michaelmas Term 1779.

In an action of trover, where the question turned upon the validity of a deed of assignment, dated the 23d of *October*, 1778, from the bankrupt to his son, of part of his real and personal estate. The assignment was impeached on two grounds; the one, that the bankrupt had committed an act of bankruptcy prior to the execution of the deed; the other, that the deed itself was an act of bankruptcy. The petitioning creditor's debt became

due, on bond the 3d of *January*, 1779. The 7th of *April* following, the commiſſion of bankruptcy iſſued. The bankrupt had carried on the buſineſs of a banker in partnerſhip with *Archer* and another; which partnerſhip commenced the 1ſt of *June*, 1776, and was diſſolved the 28th of *March*, 1778. But the bankrupt appeared to continue in the buſineſs for a length of time afterwards. The bankrupt and his family lived at his ſeat at *Ware Park*, in *Hertfordſhire*, having another houſe in town, in *White Hart Court*, *Gracechurch Street*, which he attended during the hours of banking buſineſs; *Green* his ſervant ſwore he was the only man who let people in and out at the town houſe. That in *Auguſt* and *September*, he denied ſeveral perſons. That he had ſometimes orders from his maſter to deny every body, at other times, ſuch as he knew to be creditors: to one creditor, *Chipps*, in particular, by name. This witneſs was contradicted on the part of the defendant, by another ſervant, who ſwore, that when any one came about buſineſs, he always called *Green*, who ſaid he had not his maſter's orders to deny. The evidence of *Green* was alſo attacked on the ſcore of its being new, the ſame not having been given before the commiſſioners, but a different act of bankruptcy having been ſworn to; and *Green* having threatened by way of revenge for a quarrel, that he would ruin the family, and that it would have been better for them, if they had paid him his wages: the defendant called other witneſſes to prove the bankrupt's attendance at publick meetings and other places during the months of *Auguſt*, *September*, and *October*. The conſideration of the deed of aſſignment could not be impeached. The defendant, as it appeared, had from time to time entered into engagements for, or advanced money to the bankrupt, more than the value of the eſtates, and

and that he had taken poſſeſſion immediately on the execution of the deed. The bankrupt left *Ware Park* on the 26th of *October*, three days after the execution of the deed, and was not ſeen afterwards.

Lord *Mansfield*.—A denial by order of a trader to a creditor is not of itſelf an act of bankruptcy, but only evidence of it, and therefore to be explained. If a man is ſick, or as this caſe is, if a man lives three days in buſineſs, and the reſt of the week in the country, this explains a denial at any other houſe or lodging at any other part of the town ſaying, go to the ſhop. On the other hand it is not neceſſary in order to conſtitute a denial an act of bankruptcy, that the bankrupt ſhould have given orders to deny *any particular perſon* by name: If he gives orders to be denied *to every body*, it includes creditors, and is a keeping the houſe within the meaning of the act of parliament. As to the firſt point, whether an act of bankruptcy had been committed, previous to the execution of the deed, it reſts chiefly on the evidence of *Green*. The ſecond queſtion will be material, if you determine for the defendant on the firſt. I take it to be clear law, that if in contemplation of bankruptcy, a man conveys to the faireſt creditor that ever exiſted, it is not a fraudulent deed as *between them*; but it tends to defeat the whole bankrupt laws, and as ſuch is held to be a fraud on the reſt of the creditors. It is equally clear, that though it be not a conveyance of the whole of his property, and that a part be omitted, yet if it be made in contemplation of bankruptcy, it is a preference, and as ſuch an act of bankruptcy. To apply this, the deed is fair as between the bankrupt and his ſon the defendant, but having been made three days before his abſconding, it is a *preference*. Verdict for the plaintiff.

VERNON v. HANKEY.

London Sittings after Trinity Term, 27 G. 3.

In an action brought againſt the defendants (one of whom had been a co-aſſignee with the plaintiff, and removed for the purpoſe) to recover the proceeds of a variety of articles, amounting to upwards of 6000 *l.* which had been aſſigned to them by the bankrupt, after ſeveral acts of bankruptcy.

Buller, J. ſaid, there have been three points made in this caſe; 1ſt, whether by the leaving of her houſe, Mrs. *Tyler* intended to delay her creditors. 2dly, Whether the leaving of the kingdom without ſuch intention, but whereby in fact creditors are delayed, be an act of bankruptcy. 3dly, As to the compoſition with Mr. *Thackery*. They are all points of general conſequence and importance. The firſt is a queſtion of fact, and it is for you to ſay what you think was Mrs. *Tyler*'s intention when ſhe left her houſe, ſhe knew that a great number of bills were ſoon to become due, and had not made any proviſion for the payment of them; beſides, the affidavit of the defendant for the purpoſe of himſelf taking out a commiſſion is very ſtrong, and ſhews you what he thought at the time. I remember a caſe about fourteen years ago, in which Lord *Manſfield* held ſuch an affidavit concluſive evidence againſt the defendant, and upon application to the court, though it was ſaid not to be concluſive, the judges were all of opinion, that it was *prima facie* evidence againſt ſuch perſon diſputing the bankruptcy he had ſworn to.

2dly,

2dly, As to the going abroad, there cannot be any doubt that Mrs. *Tyler*'s creditors were thereby delayed—but it is said, that it is not sufficient unless the going was with an intention to delay them, and that the bankrupt went to *Calais* merely to avoid an impending prosecution.——The law upon this subject is established by *Woodier*'s case, which happened in 1739, and was not so strong a case as this, for he had more ground for his apprehension; having killed his wife. The point, indeed, has never been neatly before the court since that time; but it has always been considered, and acted upon as good law. And at this time, without examining into the expedience of that decision I should be extremely averse to overrule it. For as you have often heard it observed from this seat, certainty and uniformity of decision are in matters of this sort, of much more material consequence than the establishment of a rule one way or the other. 3dly, It appears from Mr. *Ward*'s evidence, that *Thackery* had sued out a commission which was sealed on the 13th of *May*, and that on the 19th in the presence of one of the defendants, he agreed upon Mrs. *Tyler*'s paying him 200*l.* and giving security for the remainder of his debt that the commission should die away. This is expressly made an act of bankruptcy by the 5 *Geo.* 2. *c.* 30. §. 24.

The assignment then made to the defendants, being subsequent to those acts of bankruptcy, there cannot be any doubt of the plaintiff's title to recover — The jury found a verdict for the plaintiff.

CHAP. V.

Ex Parte WHITE. 2 BRO. 47.

On a petition by the bankrupt, praying that the *Chancellor* would appoint a meeting of the commiſſioners, that he might ſurrender; and ſtating that a few days before he was declared bankrupt, he was obliged to go abroad for his health, and that from the time of his hearing of the commiſſion till he came over, he had been extremely ill. It was a partnerſhip bankruptcy, and the two other partners ſurrendered in time.

When this petition came on firſt, the Lord Chancellor ordered it to ſtand over, to ſee what the aſſignees had to ſay. They now appeared by counſel, and did not oppoſe the prayer of the petition, but made an affidavit, that the bankrupt had been ſeen a few days before he went abroad, apparently in good health; and that the ſon of the bankrupt had at the laſt meeting, ſaid the petitioner would not ſurrender.

Lord Chancellor ſaid, ordering the commiſſioners to appoint a meeting, that the bankrupt might ſurrender, would not avoid the effect of the ſtatute. It only has the effect of declaring the opinion of the court, that the bankrupt had no intention of keeping out of the way fraudulently. But my opinion in this caſe is, that he did purpoſely keep out of the way, and that he is perjured, when he ſays he went abroad for his health. The petition was diſmiſſed.

Ex Parte GRAHAM. 2 BRO. 48.

In a petition by a bankrupt for an order to the commiſſioners to appoint a meeting to receive

ceive the bankrupt's further examination, it appeared the Lord Chancellor had before made an order for the commiſſioners to appoint a meeting, that the bankrupt might ſurrender and be examined, and when he appeared before the commiſſioners, they were diſſatisfied with his anſwers, and committed him. He now ſtates that he has recollected circumſtances more particularly, and is deſirous to complete his examination and be diſcharged out of cuſtody, but the commiſſioners refuſe to appoint a meeting.

The aſſignees oppoſed the prayer of the petition, ſo far as it required the expence of the commiſſioners meeting to be paid out of the eſtate, alledging that as this extraordinary expence aroſe from the bankrupt's own miſconduct, he ought to pay it himſelf.

Lord Chancellor.—It is a commitment, till conformity; the form of the commitment is concluſive. The meeting muſt be at the expence of the eſtate. The bankrupt has no eſtate, or is ſuppoſed to have none. The commiſſioners muſt appoint a meeting.

CHAP. VI.

TOUSSAINT *v.* MARTINNANT.

2 *Term Rep.* 100.

An action was brought for money paid, &c. to which the defendant pleaded, 1ſt, *Non aſſumpſit:* 2dly, that the defendant became a bankrupt on the 11th of *February*, 1785, and that the cauſes of action accrued to the plaintiffs before. At the trial, before *Buller*, J. the jury found a verdict for the plaintiffs, damages 1200*l.* ſubject to the opinion of the court on the following caſe;

The defendant having borrowed ſeveral ſums of money amounting to 1500*l.* from different per-

ſons prevailed on the plaintiffs on the 8th of *November*, 1783, to execute jointly with him ſeveral bonds of this date, to the perſons advancing the money, and thereby to become jointly and ſeverally bound with him for the payment of the principal and intereſt by inſtalments, the firſt of which was to become due on the 8th of *March*, 1786. The defendant by bond of the ſame date, 8th of *November*, 1783, became bound to the plaintiffs in 3000 *l.* with condition for the payment of 1500 *l.* with intereſt on the 8th of *February*, 1784, and gave them a warrant of attorney to enter up judgment thereupon, which bond and warrant of attorney were given by the defendant to the plaintiffs, to ſecure to them the payment of the 1500 *l.* and intereſt, for which they had ſo become engaged as aforeſaid. On the 13th of *Auguſt*, 1784, the plaintiffs ſigned judgment, againſt the defendant for 3000 *l.* debt, and 63 *l.* coſts, by virtue of the ſaid warrant, and on the 29th of *November*, 1784, ſued out a writ of *fieri facias*, returnable on the 24th day of *January*, 1785; upon which the goods of the defendant, to the amount of 1050 *l.* were taken. On the 2d day of *December*, 1784, a commiſſion of bankrupt iſſued againſt the defendant, and he was thereupon declared to have committed an act of bankruptcy. On the 31ſt of *May*, 1785, the defendant obtained his certificate. Soon after the iſſuing of this commiſſion, the aſſignees claimed the effects taken under the execution; and the ſheriffs indemnified by them, delivered to them the goods, and returned *nulla bona* to the ſaid writ of *fieri facias*. The obligees in the inſtalment bonds proved the ſums due on their ſeveral bonds, under the commiſſion againſt the defendant, and received a dividend of 5 *s.* 6 *d.* in the pound in reſpect thereof, and the reſt of the principal and intereſt, ſecured by theſe bonds amounting to 1200 *l.* 4 *s.* 7 *d.* and for which this

this action was brought, has been paid by the plaintiffs ſince the date of the defendant's certificate to the ſaid obligees, who thereupon by deed aſſigned over to them the ſubſequent dividends. If the court ſhall be of opinion, that the plaintiffs ought not to recover, then a nonſuit to be entered.

Aſhhurſt, J. There is no doubt but that wherever a perſon gives a ſecurity by way of indemnity for another, and pays the money the law raiſes an *aſſumpſit*. But where he will not rely on the promiſe which the law will raiſe, but takes a bond as a ſecurity, there he has choſen his own remedy, and he cannot reſort to an action of *aſſumpſit*. Therefore in this caſe his only ſecurity is the bond. Poſſibly, if the plaintiffs had recovered upon the bond when it was forfeited, and he was not afterwards damnified by being obliged to pay the inſtalments; by a bill in equity he might have been compelled to refund all that money which he had received. But at law the penalty of the bond became a legal debt, and as ſoon as that was forfeited, he became a creditor of the bankrupt and might have proved his debt under the commiſſion. But ſtill the bond was his remedy, and he ſhall not be permitted to change his ſecurity upon a ſubſequent event, and reſort to the indemnity which the law would have raiſed.

Buller, J. In ancient times no action could be maintained at law, where a ſurety had paid the debt of his principal. And the firſt caſe of the kind, in which the plaintiff ſucceeded, was before *Gould*, J. at *Dorcheſter*, which was decided on equitable grounds. Now why does the law raiſe ſuch a promiſe, becauſe there is no ſecurity given by the party; but if the party chooſe to take a ſecurity, there is no occaſion for the law to raiſe a promiſe. Promiſes in law only exiſt where there

is

is no expreſs ſtipulation between the parties. In the preſent caſe the plaintiffs have taken a bond, and therefore they muſt have recourſe to that ſecurity. It has been objected by the plaintiffs counſel, that this bond could not be proved under the commiſſion of bankrupt; but there would have been no difficulty in that. Firſt, it is ſaid, that there is no conſideration for it, but clearly, as a queſtion at law there is a ſufficient conſideration, for the ſurety binds himſelf to pay the debt of another who afterwards becomes a bankrupt, the conſideration is therefore good in law. And it is not unreaſonable, for the ſurety may ſay, he will only lend his credit for three months, and if the money is not paid at that time he will call on the principal for his indemnity. The ſurety is the effective and reſponſible man, he is the perſon to whom the creditor principally looks, and he is taken becauſe the credit of the principal is doubted. There is as little foundation for the other objection, that the bond is fraudulent, becauſe it is made payable before the day on which the firſt inſtalment became due. It is not fraudulent againſt the eſtate of the bankrupt, for the bankruptcy cannot make any difference in this caſe. In no event could this circumſtance have that effect on the bankrupt's eſtate which has been ſuggeſted, (that it would load the bankrupt's eſtate with a double dividend for the ſame debt). For in the caſe put, a court of equity would undoubtedly give relief. If it were attempted to prove the two bonds under the commiſſion, a court of equity would interpoſe, and would not ſuffer more than twenty ſhillings in the pound to be paid for the ſame debt. I do not indeed ſay, by what particular courſe a court of equity would give relief; one way would be to compel the creditor to make his election, to which of the two ſecu-

ſecurities he would reſort, or where the whole ſum had been proved under one of the bonds, they would compel the party in poſſeſſion of the other to give it up. But with reſpect to the form of this action, I am clearly of opinion that it cannot be ſupported. Judgment of nonſuit to be entered.

Ex parte KING.

10th November, 1786.

Edward Davis the bankrupt on the 8th of *May* 1784, iſſued a promiſſory note under his hand, payable by him two months after date to Meſſrs. *Turner* and *Toye*, of *Briſtol*, for 500 *l.* value received; *Turner* and *Toye* being then indebted to *King* the petitioner in the ſum of 300 *l.* for money lent, advanced, and paid by him to and for their uſe. *Turner* and *Toye*, had alſo become bankrupts. Previous to their bankruptcy, and alſo previous to the bankruptcy of *Davis*, they endorſed the ſaid promiſſory note for 500 *l.* to *King*, to enable him to raiſe the 300 *l.* due from them to him. *King* on the 24th of *July*, 1784, applied to prove the note for 500 *l.* under the commiſſion againſt *Davis*, but the commiſſioners only admitted it as a proof of a debt of 300 *l.* Upon which *King* petitioned the Lord Chancellor to be admitted a creditor for the whole ſum.—— This was oppoſed upon the ground of the bankrupt having never received any conſideration for the note from Meſſrs. *Turner* and *Toye*, it being between them accommodation paper. But it was ordered that *King* ſhould be at liberty to prove his ſaid debt of 500 *l.* and be admitted a creditor under the ſaid commiſſion for ſuch ſums as he ſhould

ſhould prove, and be paid a dividend or dividends in reſpect of his ſaid debt ratably and in equal proportion with the reſt of the creditors of the ſaid bankrupt, ſeeking relief under the ſaid commiſſion, but ſo as not to diſturb any dividends already made under the ſaid commiſſion, and ſo as that the dividends received, and to be received by him upon the ſaid ſum of 500*l.* do not in the whole exceed the ſum of 300*l.*

Ex parte BEAUFOY.

22*d January*, 1787.

Upon a petition ſtating, that *Mitchell* and *Cleeter*, having occaſion in the courſe of extenſive buſineſs as ſtuff merchants, to draw bills of exchange on Meſſrs. *Marlar*, *Pell*, and *Down*, of *London*, and finding it neceſſary to lodge ſome collateral ſecurities with them, to induce them to accept and pay their bills; they in the month of *March*, 1778, applied to *Beaufoy*, and requeſted him to lend them his promiſſory note, for the ſum of four hundred pounds payable on demand, which he accordingly did, and received in exchange from *Mitchell* and *Cleeter*, a memorandum or agreement in writing in the following words:

"*March* 17, 1788, Received this day of *Ben-*
"*jamin Beaufoy*, his note of hand payable to us
"for value 400*l.* which is lodged in the hands
"of our bankers Meſſrs. *Marlar*, *Pell*, and *Down*,
"in *London*, as a collateral ſecurity for their ac-
"cepting drafts on them without effects to the
"ſaid amount, which note if ever paid by the
"ſaid *Benjamin Beaufoy*, we hereby promiſe to
"refund the ſaid ſum of 400*l.* to the ſaid *Ben-*
"*jamin*

"*jamin Beaufoy* on demand. "*Mitchell* and "*Cleeter*."

The promiſſory note of *Beaufoy* was immediately depoſited with *Marlar*, *Pell*, and *Down*, who were the bankers, as well of *Beaufoy*, as of *Mitchell* and *Cleeter*, and the ſame continued in their hands until the diſſolution of their copartnerſhip, when the note was given over to Meſſrs. *Down*, *Thornton* and *Free*, who had entered into a copartnerſhip for carrying on the ſaid banking buſineſs, and continued in their hands until the month of *March*, 1784, when they requeſted the ſame to be renewed; and *Beaufoy* upon the requeſt of *Mitchell* and *Cleeter*, agreed to renew his note, and accordingly took up the ſame, and drew another promiſſory note, dated the 17th *March*, 1784, whereby on demand he promiſed to pay to the ſaid *Thomas Mitchell* and *John Cleeter*, or order, 400*l.* for value received, which ſaid promiſſory note *Mitchell* and *Cleeter*, endorſed and depoſited with the petitioners *Down*, *Thornton*, and *Free*, in lieu of the other note, and *Mitchell* and *Cleeter*, alſo renewed or gave to *Beaufoy* a certain other memorandum or agreement in writing, to the like purport and effect as the one beforementioned.

In the month of *November*, 1784, *Mitchell* and *Cleeter*, being in want of the aſſiſtance of a further ſum of 400*l.* applied to *Down*, *Thornton*, and *Free*, to advance them the ſame; which they agreed to do upon a ſecurity of another promiſſory note of *Beaufoy*, who upon the requeſt of *Mitchell* and *Cleeter*, drew another promiſſory note, dated the 17th of *November*, 1784, whereby on demand he promiſed to pay the ſaid *Thomas Mitchell* and *John Cleeter*, the ſum of 400*l.* for value received; which note *Mitchell* and *Cleeter*, alſo endorſed and depoſited with *Down*, *Thornton*, and *Free*, who were the bankers of *Beaufoy*, as a ſecurity for the

further ſum of 400 *l.* and *Mitchell* and *Cleeter*, gave *Beaufoy* their promiſſory note in exchange for the ſame; which counternote was in the following words: "£.400, *Coventry*, 17th *Novem-* "*ber*, 1784, on demand, we promiſe to pay "to Mr. *B. Beaufoy*, or order, 400 *l.* value re- "ceived. "*Mitchell* and *Cleeter*."

In the beginning of the month of *April*, 1785, *Mitchell* and *Cleeter*, being conſiderably indebted to *Thornton* and *Free*, over and above the amount of the ſaid promiſſory notes, they called upon *Beaufoy* for the payment of the whole of the ſaid 800 *l.* and *Beaufoy* on the 14th of the ſaid month of *April*, gave his bond for the payment of the ſaid ſum with intereſt at the rate of 5 *l. per cent.* and thereupon the ſaid two promiſſory notes, were delivered up to *Beaufoy* by *Down*, *Thornton*, and *Free*, with a receipt thereon reſpectively endorſed.

On the 13th of *April*, 1785, a commiſſion of bankrupt iſſued againſt *Mitchell* and *Cleeter*, and they were declared bankrupts on the 7th of *May*; *Beaufoy* applied to prove a debt of 800 *l.* being the amount of the ſaid two promiſſory notes, but it appearing that ſuch notes had not been taken up by the petitioner *Beaufoy*, till the 14th of *April*, and the commiſſion had actually iſſued on the 13th although not publiſhed in the *Gazette* till the 23d. the commiſſioners refuſed to admit him as a creditor for the 800 *l.*

On the 14th day of *February*, 1786, a dividend of 10 *s.* in the pound was declared under the commiſſion, and ſufficient remained in the hands of the aſſignees to anſwer *Beaufoy*'s claim, if his right to prove 800 *l.* ſhould be eſtabliſhed. *Beaufoy* therefore petitioned, that he might be at liberty to prove the debt of 800 *l.* under the commiſſion, and receive the dividend already declared and all future dividends.

The

The Chancellor after hearing the matter argued, made an order, That *Beaufoy* ſhould be at liberty to prove the promiſſory note for 400*l.* from *Thomas Mitchell* and *John Cleeter*, the bankrupts, bearing date the 17th of *November*, 1784, as a debt under the commiſſion, and be paid out of the eſtate and effects of the ſaid bankrupts, a dividend in reſpect of his ſaid debts, and diſmiſſed the reſt of the petition.

Ex parte LORD CLANRICARDE.

27th July, 1787.

John Griffin, was in a conſiderable way of trade and a banker, at *Fareham*, in *Hampſhire*. Lord *Clanricarde*, having a large property in *Ireland*, uſed to get the ſame remitted by the means of *Griffin*, who had dealings in *Ireland*. And for that purpoſe on or about the 10th of *January*, 1787, Lord *Clanricarde* drew a bill of exchange upon *Griffin* for the ſum of 60*l.* 17*s.* 9*d.* payable to one *John Stokes* or order, three months after date; and *Griffin* on or about the 24th of *March*, 1787, drew a draft or bill of exchange upon one *John Turner* for 200*l.* payable to Lord *Clanricarde* or his order, two months after date, and *Turner* accepted the ſame.

On the ſaid 24th of *March*, Lord *Clanricarde* and *Griffin* ſettled accounts, and therein charged Lord *Clanricarde*, with the ſaid ſum of 60*l.* 17*s.* 9*d.* and 200*l.*; and by the means of thoſe ſums and other ſums therein mentioned, the ſaid *John Griffin* made a balance againſt Lord *Clanricarde* of 515*l.* 7*s.* Lord *Clanricarde* at the ſame time drew two drafts, one for 300*l.* the other for 215*l.* 7*s.* on Meſſrs. *Hamilton* and Co. bankers in *Dublin*, both payable in

in ſix months to the ſaid *John Griffin* or order, who immediately diſcounted the ſame with Meſſrs. *Sadler* and Co. *Southampton*, and received the money from them.

On the 17th of *April*, 1787, a commiſſion of bankrupt iſſued againſt *Griffin*, and he was declared a bankrupt.

Although *Griffin* in the ſaid account, charged Lord *Clanricarde* with the 60*l.* 17*s.* 9*d.* yet in fact he never paid the ſame, and the draft or bill of exchange for the ſame, not becoming due until after he was declared a bankrupt, Lord *Clanricarde* afterwards paid it; and as he had never received any money on account thereof, it was inſiſted on the part of his Lordſhip, that it was a debt due to him from *Griffin*, before his bankruptcy. *Turner*, being inſolvent and refuſing to pay the draft for 200*l.* Lord *Clanricarde* never received any money on account of the ſame; and he therefore inſiſted, that *Griffin* was, before his bankruptcy, alſo juſtly indebted to him, in that 200*l.*

At a meeting of the commiſſioners under the ſaid commiſſion againſt *Griffin*, on the 2d of *June*, 1787, Lord *Clanricarde* attempted to prove before them, the ſum of 260*l.* 17*s.* 9*d.* being the amount of the ſaid two ſums of 60*l.* 17*s.* 9*d.* and 200*l.* but they refuſed to permit him, alledging that as he only gave drafts or bills of exchange by way of conſideration for the ſaid two ſums, and which drafts or bills had not become due, nor were paid before the bankruptcy of *Griffin*, the ſaid 260*l.* 17*s.* 9*d.* was not due from *Griffin*, before his bankruptcy: upon which his Lordſhip petitioned to be admitted to prove.

And the Lord Chancellor ordered, That the petitioner be at liberty to prove his ſaid debt of 260*l.* 17*s.* 9*d.* and be admitted a creditor

ditor under the ſaid commiſſion for what he ſhall ſo prove, but the dividend or dividends upon the ſaid debt, to be ſtaid until the account relative to the other bills mentioned in the petition is finally ſettled and adjuſted.

Ex Parte BRYMER,

30*th May*, 1788.

The houſe of *Scott* and *Pearſon* having had frequent occaſions to get their bills diſcounted by perſons at *Briſtol*, and continuing to require a negociation of paper, they applied to *Wilkins* the bankrupt, and to one *Forſyth*, to aſſiſt them by lending their names to bills, which were to be diſcounted by *Samuel Span*, of *Briſtol*, for the uſe of *Scott* and *Pearſon*, whoſe names were not to appear thereon.——Accordingly (amongſt others) three bills were drawn by *Forſyth* upon *Wilkins*, dated 28th of *May*, 1787, for 800 *l.* each, payable three months after date. Two to the order of *Samuel Span*, and the third to the order of the drawer, which laſt was endorſed in blank by the drawer. They were all accepted by *Wilkins* about the time of their being drawn.——The three bills were put into the poſſeſſion of *Scott* and *Pearſon*, and were by them ſent down to *Span*, at *Briſtol*, who endorſed them, and procured them to be diſcounted by other perſons, and remitted the value to *Scott* and *Pearſon*, in *Briſtol* bank bills. Before the bills became due, both *Scott* and *Wilkins* became bankrupts, and afterwards *Span* as the endorſer was obliged to take them up.

Under theſe circumſtances *Span* was admitted to prove the bills under *Wilkins*'s commiſſion.—And

this petition was preferred to have the proof of the debt expunged.

The Lord Chancellor conſidered it as a very clear point, that a bill of exchange negociated after the bankruptcy of the acceptor, might be proved under his commiſſion, although the party was not poſſeſſed of it at the time of the bankruptcy, for the debt accrued by the acceptance; and that as to the conſideration, there was a clear conſideration paid in this caſe, though not to *Wilkins*, and that *Span* became the holder of theſe bills in a fair manner, and his Lordſhip diſmiſſed the petition.

A new petition was preferred, praying that the former petition might be reheard and the debt expunged.

The Lord Chancellor after hearing counſel, expreſſed himſelf to be very clearly of the ſame opinion.

18th July, 1788.

CHAP. VII.

BROOKS v. LLOYD.

1 *Term Rep.* 17.

Samuel Lloyd, being indebted in 54*l.* for goods ſold and delivered by the plaintiff, was arreſted for the ſame, and in order to procure his diſcharge prevailed on *Edward Lloyd* to become ſurety with him, in a joint and ſeveral bond given to the plaintiff, bearing date the 27th of *September*, 1784, which was payable by inſtalments, and before the firſt default the defendant *Edward Lloyd* became a bankrupt, and a commiſſion iſſued, under which the plaintiff neglected to prove his debt, but brought an action to recover the money.

Lord

Lord *Mansfield* ſaid, they are both principals and both are liable, the credit was given to the defendant *Edward Lloyd* as well as to *Samuel Lloyd*. And as under the ſtatute the plaintiff could have proved the bond under the commiſſion, and he neglected to do it; the rule for ſetting aſide the *fieri facias* muſt be made abſolute.

CHAP. VIII.

Ex parte SMITH.

23d December, 1741.

By articles of agreement dated the 20th day of *May*, 1730, executed previous to the marriage between *Benjamin Oſman*, and *Beatrice Wilſon*, and made between the ſaid *Benjamin Oſman* of the firſt part, *John Wilſon*, clerk, the petitioner *Beatrice*'s father; and the petitioner his ſaid daughter of the ſecond part; and *Thomas Shepheard*, gentleman, and the petitioner *Benjamin Smith*, of the third part. The ſaid *Benjamin Oſman* in conſideration of the marriage, and of the ſum of 450 *l.* the petitioner *Beatrice*'s marriage portion, and which was actually paid to him by the petitioner *Beatrice*'s ſaid father, before the execution of the articles, did for himſelf, his heirs, executors and adminiſtrators, covenant, promiſe and agree, to and with the ſaid *Thomas Shepheard*, and *Benjamin Smith*, their executors and adminiſtrators; that in caſe the ſaid marriage took effect, and the petitioner *Beatrice* happened to ſurvive her ſaid then intended huſband, or in caſe ſhe ſhould happen to die in his life-time, then and in either of the ſaid caſes the ſum of 1000*l.* ſhould with all convenient ſpeed after the deceaſe of either of them which ſhould firſt happen, be advanced and

raiſed out of the perſonal eſtate of the ſaid *Benjamin Oſman*; and that the ſaid perſonal eſtate ſhould ſtand charged and chargeable with the payment of the ſaid 1000 *l.* which ſhould be ſet out at intereſt in the names of the ſaid *Thomas Shepheard*, and *Benjamin Smith*, or the ſurvivor of them, or the executors or adminiſtrators of ſuch ſurvivor, in truſt to and for the ſeveral uſes, intents and purpoſes therein and hereinafter mentioned; (that is to ſay,) in truſt that they ſhould permit and ſuffer the ſaid *Benjamin Oſman*, (if he ſhould be then living) to have take and receive the intereſt and increaſe of the ſaid 1000 *l.* to his own uſe, for and during the term of his natural life, and from and after his deceaſe in caſe the petitioner *Beatrice* ſhould be then living; then upon truſt, that they ſhould out of the intereſt and increaſe of the ſaid 1000 *l.* in the firſt place permit and ſuffer the petitioner *Beatrice*, to have receive and take to her own uſe the ſum of 40 *l.* a year, clear of all deductions for and during her life, from the deceaſe of the ſaid *Benjamin Oſman*, in recompence of dower: And ſhould and would permit and ſuffer the executors and adminiſtrators of the ſaid *Benjamin Oſman*, to receive and take the reſt and reſidue of the intereſt of the ſaid 1000 *l.* to his, her, and their own uſe and uſes, and immediately from and after the death of the ſurvivor of the ſaid *Benjamin Oſman*, and the petitioner *Beatrice*, upon truſt, to permit and ſuffer the children of the ſaid *Benjamin Oſman*, upon the body of the petitioner *Beatrice*, to be begotten, that ſhould be living at the time of the deceaſe of ſuch ſurvivor, to receive have and take the ſum of 800 *l.* to their own uſe, by equal portions ſhare and ſhare alike; and if but one ſhould happen to be then living, then that they ſhould permit and ſuffer ſuch child to receive and take the ſaid 800 *l.* and ſhould permit

and

and ſuffer the executors and adminiſtrators of the ſaid *Benjamin Oſman*, to receive and take 200*l.* reſidue of the ſaid 1000*l.* to his her or their own uſe, and in caſe there ſhould be no child or children living as aforeſaid, at the death of the ſurvivor of the ſaid *Benjamin Oſman*, and the petitioner *Beatrice*, the ſettlement gave a power of appointment to the wife of 450*l.* The marriage took effect, and *Oſman*, more effectually to ſecure the payment of the ſaid 1000*l.* to the ſaid truſtees for the purpoſe aforeſaid, did in *Eaſter* term in the eighth year of his preſent majeſty, confeſs a judgment in the court of common pleas, at *Weſtminſter*, to the ſaid *Thomas Shepheard*, and *Benjamin Smith*, for the ſaid 1000*l.* By a deed poll dated the 27th day of *September*, 1735, in part reciting the ſaid articles, and alſo reciting that the ſaid *Thomas Shepheard*, and *Benjamin Smith*, had obtained ſuch judgment againſt the ſaid *Oſman*, the ſaid *Shepheard* and *Smith*, did declare that the ſaid judgment was intended for the effectual raiſing and paying the ſaid 1000*l.* unto the ſaid *Thomas Shepheard* and *Benjamin Smith*, to and for the ſeveral uſes, intents and purpoſes mentioned in the ſaid articles. On the 5th day of *January*, 1741, a commiſſion of bankruptcy iſſued againſt the ſaid *Benjamin Oſman*, whereupon he was declared a bankrupt. *Smith* who was the ſurviving truſtee, proved the debt upon the judgment, before the commiſſioners. *Timothy Colles* the aſſignee under the commiſſion, refuſed to pay the dividend in reſpect of the ſaid 1000*l.* due on the ſaid judgment, or for any part thereof, or to ſet apart any of the ſaid bankrupt's eſtate to anſwer the truſts of the ſaid articles. And therefore the petition prayed that the petitioner *Benjamin Smith*, might be admitted a creditor under the ſaid commiſſion for the ſaid 1000*l.* or ſuch part thereof as his lordſhip ſhould think fit, in truſt for the purpoſes men-

tioned in the marriage articles, and that he might be paid out of the ſaid bankrupt's eſtate, then remaining in or which ſhould thereafter come to the hands of the aſſignee under the ſaid commiſſion, a dividend or dividends in reſpect thereof ratably and in equal proportion with the other creditors of the ſaid bankrupt, ſeeking relief under the ſaid commiſſion. Upon the hearing of the petition the aſſignee did not appear, but upon argument by the petitioner's counſel, the Lord Chancellor ordered that the petitioner *Benjamin Smith*, be admitted a creditor under the ſaid commiſſion, for the ſum of 1000 *l.* and that he be allowed a dividend in reſpect thereof in equal proportion with the other creditors of the ſaid bankrupt ſeeking relief under the ſaid commiſſion. And that what ſhould be ſo allowed to the petitioner for ſuch dividend, ſhould be placed out by the ſaid aſſignee in the names of the ſaid *Benjamin Smith*, and of another truſtee to be appointed by the major part of the commiſſioners named in the ſaid commiſſion, upon government or real ſecurities, upon truſt, to pay the intereſt or dividends thereof, during the life of the ſaid bankrupt to the ſaid aſſignee, for the benefit of the creditors under the ſaid commiſſion, and after the deceaſe of the ſaid bankrupt upon the truſts, and for the purpoſes declared and mentioned in and by the ſaid marriage articles of the 20th day of *May* 1730, to take place after the death of the ſaid bankrupt.

Ex parte BROWN *and Others.*
14*th March*, 1788.

Mary Hall, formerly *Mary Evatt*, was entitled to two ſums of 600 *l.* and 400 *l.* upon two bonds, executed to her by one *George Acklam*, and *William Lawrence*, and was alſo poſſeſſed of a conſiderable

siderable fortune. A marriage being intended between *Nathaniel Hall*, and *Mary Evatt*, in consideration of such marriage, it was by articles bearing date the first of *October* 1773, agreed that the sum of 2000 *l.* part of the fortune of the said *Mary Evatt*, should be paid to the said *Nathaniel Hall*, upon his executing to her trustees *William Brown*, and *Robert Duke*, a bond for the same, and which said sum of 2000 *l.* was paid to the said *Nathaniel Hall*. Accordingly he gave his bond for the same. The trusts of the marriage articles were, that the 1000 *l.* and 2000 *l.* and the bonds so given and executed for the same were to be and remain in trust, for the said *Mary Evatt*, until the marriage and after the solemnization thereof, then in trust, for such person or persons, and for such intents and purposes as the said *Mary Evatt*, should (notwithstanding her intended coverture) by any deeds or will direct or appoint, and for want of such direction to pay the interest and produce of the said sum of 1000 *l.* to such persons as the said *Mary Evatt* should direct and appoint, and for want of such last mentioned direction, to impower her to receive the same for her life. And it was by the said marriage articles declared that the said sum of 1000 *l.* and the interest thereof, should not be at the disposal of, or subject, or liable to the debts or any engagements of the said *Nathaniel Hall*, but should be from and after the death of the said *Mary Evatt*, upon such trusts as are declared of and concerning the said 2000 *l.* And as for and concerning the said sum of 2000 *l.* it was declared to be in trust, to pay the interest and produce thereof unto the said *Nathaniel Hall*, or permit and suffer him to retain the same, for the term of his natural life, in case he should continue solvent and fully able to pay all his creditors, but if he should not continue solvent and able to pay all his creditors, then for and during such time only as he should continue

Lockyer v. Savage. 2 Stra. 947.

ſolvent; and from and after his deceaſe or inſolvency which ſhould firſt happen, in truſt to pay the intereſt of the ſaid ſum of 2000 *l.* to ſuch perſons as the ſaid *Mary Evatt* during her natural life, ſhould by any deeds or writings order and direct, to the intent that the ſame ſhould not be at the diſpoſal of or ſubject or liable to the controul debts or engagements of the ſaid *Nathaniel Hall*, but only at her own ſeparate diſpoſal, and in default of ſuch direction or appointment in truſt, to pay the ſame into the proper hands of the ſaid *Mary Evatt*, or permit or impower her to receive the ſame, whoſe receipt alone was thereby declared ſhould be a good and ſufficient diſcharge, and from and after the deceaſe of the ſurvivor of them the ſaid *Nathaniel Hall*, and *Mary Evatt*, in caſe the ſaid *Nathaniel Hall* ſhould continue ſolvent, and able to pay his creditors for the whole term of his natural life, but in caſe he ſhould not ſo long continue ſolvent, then after the deceaſe of the ſaid *Mary Evatt*, and ſuch inſolvency of the ſaid *Nathaniel Hall* in truſt, to pay, aſſign, and divide the ſaid ſum of 2000 *l.* unto and amongſt the children of the ſaid marriage, in ſuch ſhares and proportions, and in ſuch manner and form as the ſaid *Nathaniel Hall*, and *Mary Evatt*, or the ſurvivor of them, ſhould by any deed or will direct or appoint, and for want of ſuch direction or appointment in truſt, to pay and divide the ſaid ſum of 2000 *l.* to and amongſt all and every the child and children of the ſaid intended marriage, ſhare and ſhare alike, if more than one, and if but one, then to ſuch only child; and in caſe there ſhould be no child or children of the ſaid intended marriage, or if ſuch, and the ſame ſhould die before he ſhe or they ſhould attain the age of 21 years, without leaving iſſue, then in truſt, to pay the ſame ſum of 2000 *l.* unto the ſurvivor of them the ſaid *Nathaniel Hall*, and *Mary Evatt*, his or her executors,

tors, adminiſtrators or aſſigns. The marriage took effect, but there was no iſſue of the ſaid marriage. Since the execution of the ſaid marriage articles, the petitioners *Thomas Brown*, and *Robert Duke*, received the ſaid ſum of 1000 *l.* due upon the ſaid two bonds, with all arrears of intereſt due thereon, amounting to the ſum of 1321 *l.* 7 *s.* 11 *d.* and with the petitioner *Mary Hall*'s conſent, out of the money ſo received, lent and advanced to, or paid and expended for the ſaid *Nathaniel Hall*, ſeveral ſums of money, making in the whole the ſum of 841 *l.* 4 *s.* The truſtees alſo lent and advanced to the ſaid *Nathaniel Hall*, the ſum of 400 *l.* other part of the ſaid ſum of 1000 *l.* and intereſt ſo received by them as aforeſaid, upon his bond and a mortgage of certain leaſehold premiſſes in *Parliament-ſtreet*, *Weſtminſter*, then in the poſſeſſion of the ſaid *Nathaniel Hall*, and the remainder thereof, together with other money of the petitioner *Mary Hall*, was laid out in the purchaſe of an annuity of 50 *l.* during the life of a lady, of the age of ſeventy-eight and upwards, and alſo in the purchaſe of certain leaſehold premiſſes, ſituate in *Gardners-lane*, *Weſtminſter*, producing an yearly income of 14 *l.* By an indenture of aſſignment bearing date the 26th day of *April*, 1784, made between the ſaid *Nathaniel Hall*, the petitioner *Mary Hall*, *Thomas Brown*, and *Robert Duke*, *John Withers*, of *Cheapſide*, *London*, merchant; *Hugh Stirrup*, of *Cateaton-ſtreet*, *London*, and the other creditors of the ſaid *Nathaniel Hall*, reciting the marriage articles, and alſo reciting that *Nathaniel Hall*, in the courſe of his trade and dealing, had become indebted to ſeveral perſons, parties to the ſaid indenture, in the ſeveral ſums of money ſet oppoſite their reſpective names, and it appearing upon an inveſtigation of his affairs, that his effects were not ſufficient to pay eight ſhillings

ſhillings in the pound on the ſaid ſeveral debts, and the ſaid *Mary Hall*, having offered to make up the deficiency of eight ſhillings in the pound out of her eſtate, he the ſaid *Nathaniel Hall*, had requeſted his ſaid creditors, to accept the ſame in full for their debts, and he had propoſed to pay ſuch compoſition in four, eight, twelve and eighteen months from the date thereof. And alſo, to aſſign all his effects to the ſaid *Withers* and *Stirrup*, in truſt for the better ſecuring the payment of the ſaid compoſition. And the ſaid *Mary Hall*, had propoſed with the concurrence of her ſaid truſtees, to aſſign all her ſeparate property (except as therein after mentioned) to the ſaid *John Withers* and *Hugh Stirrup*, as a further ſecurity for the ſaid compoſition. And had alſo propoſed to relinquiſh her claim to a dividend in reſpect of the debt due to her from the ſaid *Nathaniel Hall*, until the whole of the compoſition ſhould be fully paid and ſatisfied. It was witneſſed, that for the conſiderations therein mentioned, he the ſaid *Nathaniel Hall*, did grant, bargain, ſell, aſſign, transfer and ſet over unto the ſaid *John Withers* and *Hugh Stirrup*, their executors, adminiſtrators and aſſigns, all and ſingular the goods, wares, merchandizes, mortgages, bills, bonds, notes and other ſecurities for money and other effects, particularized in the ſchedule thereunder written: to hold, receive and take the ſame unto the ſaid *John Withers* and *Hugh Stirrup*, their executors, adminiſtrators and aſſigns for ever, upon the truſts therein mentioned. And by the ſame indenture, they the ſaid *Thomas Brown* and *Robert Duke*, at the requeſt of the ſaid *Mary Hall*, did bargain, ſell, aſſign, transfer and ſet over unto the ſaid *John Withers* and *Hugh Stirrup*, their executors, adminiſtrators and aſſigns, all and every ſum and ſums of money due

and

and owing from him the ſaid *Nathaniel Hall*, and all and every other ſum and ſums of money veſted in them by the ſaid ſettlement, mortgages, bills, bonds, notes and other ſecurities for money, which the ſaid *Thomas Brown* and *Robert Duke* were poſſeſſed of, as truſtees named in and acting under the ſaid ſettlement (ſave and except the ſaid annuity of 50 *l.* and the ſaid leaſehold premiſes in *Gardner's Lane)* To hold the ſame unto the ſaid *John Withers* and *Hugh Stirrup*, their executors, adminiſtrators and aſſigns, upon the truſts therein mentioned. And the ſaid *Mary Hall* did direct, limit, and appoint unto the ſaid *John Withers* and *Hugh Stirrup*, their executors, adminiſtrators and aſſigns, the ſaid ſums of 1000 *l.* and 2000 *l.* ſo veſted in her, by the ſaid marriage ſettlement, and under which ſhe had a right to limit and appoint the ſame, and the funds and ſecurities in which the ſame had been inveſted, and all other the eſtate whatſoever, in or to which ſhe was intereſted or entitled, under and by virtue of the ſaid ſettlement (except the ſaid annuity and the ſaid leaſehold premiſes) to hold the ſame unto the ſaid *John Withers* and *Hugh Stirrup*, their executors, adminiſtrators and aſſigns, upon the truſts therein mentioned, and it was thereby declared, that the ſaid *John Withers* and *Hugh Stirrup*, ſhould ſtand poſſeſſed of the ſaid truſt premiſes, in truſt thereout to pay, after deducting all expences, the compoſition of eight ſhillings in the pound, and if any ſurplus ſhould remain, it was thereby declared, that the ſaid *John Withers* and *Hugh Stirrup*, ſhould ſtand poſſeſſed of the ſame for the uſe of the ſaid *Thomas Brown* and *Robert Duke*, upon the truſts contained in the ſaid ſettlement.

All or the greateſt part of the creditors of the ſaid *Nathaniel Hall*, executed the laſt mentioned deed of compoſition, and agreed to accept and take the ſaid eight

eight ſhillings in the pound upon their reſpective debts. *Nathaniel Hall* paid and ſatisfied the ſaid compoſition of eight ſhillings in the pound to moſt of the creditors; and the petitioner *Mary Hall*, paid out of her own proper money, the compoſition to the remainder of the creditors, except the ſum of 70 *l.* or thereabouts, which ſhe offered to pay. *Mary Hall*'s ſeparate eſtate aſſigned as aforeſaid, was not appropriated to the payment and ſatisfaction of the ſaid compoſition. On the 21ſt of *May* 1787, a commiſſion of bankrupt was awarded and iſſued againſt the ſaid *Nathaniel Hall*, and he was thereupon declared bankrupt accordingly, and was at that time indebted to *Brown* and *Duke* as truſtees, in the ſum of 3241 *l.* 4 *s.* with intereſt thereon. The truſtees offered to prove the ſaid debt, and the intereſt due in reſpect of the ſame, but the commiſſioners refuſed to permit them. Upon which the preſent petition was preferred, praying that the ſaid *Thomas Brown* and *Robert Duke*, might be at liberty to prove the ſaid ſum of 3241 *l.* 4 *s.* together with ſuch intereſt, as might appear to be legally due in reſpect of the ſame under the ſaid commiſſion. And that they might receive a dividend upon the ſame ratably, and in proportion with the reſt of the creditors of the ſaid *Nathaniel Hall*, to anſwer the truſts of the ſaid indenture of ſettlement. The Lord Chancellor ordered, that upon payment by the petitioners, or any of them, to *John Withers* and *Hugh Stirrup*, the truſtees under the deed of compoſition of the ſum of 70 *l.* mentioned in the ſaid petition, to be remaining due to the creditors under the ſaid deed, together with twenty ſhillings for the coſts of the ſame truſtees on this application, the petitioner ſhould be admitted creditors under the ſaid commiſſion, for the ſaid ſum of 2000 *l.* in the ſaid petition, mentioned,

tioned, and be paid a dividend or dividends thereon, ratably and in equal proportion with the reſt of the creditors of the ſaid bankrupt ſeeking relief under the ſaid commiſſion, but ſo as not to diſturb any dividend or dividends already made under the ſaid commiſſion. And referred it to the major part of the commiſſioners named in the ſaid commiſſion, to take an account of the principal and intereſt due on the mortgage for the ſum of 400 *l.* in the ſaid petition mentioned. And alſo ordered that the ſaid leaſehold premiſes comprized in the ſaid mortgage, ſhould be forthwith ſold before the ſaid commiſſioners. And that the aſſignees under the ſaid commiſſion, the bankrupt and all proper parties ſhould join with the ſaid commiſſioners in the execution of a proper conveyance or conveyances, to the purchaſor or purchaſors thereof, and produce before the ſaid commiſſioners upon oath, all deeds, papers, and writings, in their reſpective cuſtody or power, relating to the title of the ſaid premiſſes, as the ſaid commiſſioners ſhall direct, and that the money ariſing by ſuch ſale ſhould be applied in diſcharge of the principal and intereſt due on the ſaid mortgage, and the ſurplus thereof (if any) paid to the aſſignees under the ſaid commiſſion; and in caſe the money to ariſe by ſuch ſale, ſhould not be ſufficient to pay and ſatisfy what ſhould be found due to the petitioners, for principal and intereſt as aforeſaid, the petitioners were to be admitted creditors under the ſaid commiſſion for ſuch deficiency, and be paid a dividend or dividends in reſpect thereof, ratably and in equal proportion with the reſt of the creditors of the ſaid bankrupt ſeeking relief under the ſaid commiſſion, but ſo as not to diſturb any dividend or dividends already made under the ſaid commiſſion.

Ex Parte

Ex Parte CORK.

7 *Vin.* 72. *pl.* 7. *Trin.* 1734.

Edward Cork, by marriage articles in 1716, covenanted to pay truſtees 4000 *l.* in caſe he ſhould die, leaving a ſon and other children who ſhould arrive to 21 equally, *&c.* *Cork* becomes a bankrupt and has a ſon and four other children all infants, who preſer their petition, praying that a ſufficient part of the eſtate might be ſet apart in order to be divided when, *&c.*

Lord Chancellor. It is uncertain whether any thing will ever become due; and before the 7 *G.* 1. *c.* 31. it was a queſtion, whether bonds or promiſſory notes payable at a future day, though certain in all events, could be let in. And the difference now in ſuch caſes is to be adjuſted by rebate of intereſt; but here, how is it poſſible to adjuſt the difference upon a contingency which may never happen?

Ex parte HILL, 23*d December*, 1786.

Ex parte Matthews, ſame point and petition diſmiſſed.

Thomas Archer (the bankrupt), entered into a bond, dated the 17th of *November*, 1777, to the petitioners *Jeremiah Hill*, the elder, and *Jeremiah Hill*, the younger, which was made and entered into by him to the petitioner, previous to and in contemplation of a marriage agreed upon, and then intended to be had and ſolemnized between him and *Mary Chivers*, ſpinſter, with whom he was to receive a conſiderable marriage portion. The bond was in the penalty of 2000 *l.* conditioned for the payment of 1000 *l.* to the *Hills*,

Hills, in truſt for the ſaid *Mary Chivers*, and the iſſue of the intended marriage, in the ſeveral events, and upon the ſeveral truſts and contingencies *mentioned in the bond*. In the condition of the bond there was the following proviſo: "Provided always, and it is the true intent and "meaning of the foregoing bond or obligation, "and condition, and of all the parties before "named, and it is hereby expreſly granted, "provided, declared and agreed, that in caſe "the ſaid *Thomas Archer*, by loſſes or misfortunes "in trade, or by any other ways or means whatſoever, ſhall during his natural life happen to "fail or become inſolvent, or bankrupt, and "the ſaid *Mary* (his ſaid intended wife), or any "iſſue of the ſaid intended marriage ſhall be "then living, then and in ſuch caſe, that theſe "preſents ſhall operate, extend, and be in force, "ſo as to enable, intitle, and give a right and "power to the petitioners, immediately or at any "time or times, from and after ſuch failure, inſolvency, or bankruptcy, to claim, come in and "be conſidered as lawful creditors, or a lawful creditor for the ſaid ſum of 1000 *l.* hereby intended to be ſecured, and to have, recover, and receive an equal part, ſhare or dividend, or "parts, ſhares, or dividends of the eſtate and "effects of him the ſaid *Thomas Archer*, for the "ſaid ſum of 1000 *l.* ratably and proportionably "with other the lawful creditors of him the "ſaid *Thomas Archer*, and that in ſuch caſe "either the ſaid *Thomas Archer*, or his aſſignees, or "creditors, or any or either of them, ſhould not "in any wiſe be entitled to ſuch dividend or dividends, or any ſubſequent intereſt or profits "therefrom, or to ariſe from, or for or in reſpect "of the ſame, or any part thereof, nor have or "receive the ſame dividend, intereſts or profits,

They were not ſtated in the petition.

"or any part or parts thereof, or any manner of "benefit or advantage ariſing therefrom, in any-"wiſe ſoever for or during the natural life of him "the ſaid *Thomas Archer*, but that in ſuch caſe the "ſaid dividend or dividends, when ſo recovered "or received by the petitioners, in caſe the ſaid "*Mary* (the intended wife of him the ſaid "*Thomas Archer*), ſhall be then living, ſhall be "by the petitioners or the ſurvivor of them, put, "placed, and continued out at intereſt, in manner "aforeſaid, and the intereſt and profits ariſing "therefrom, paid unto her the ſaid *Mary*, during "the joint natural lives of her and the ſaid *Thomas* "*Archer*, to and for her own ſole and ſeparate uſe, "benefit, advantage, and diſpoſal as her ſole and "ſeparate eſtate and property."

The marriage took place, and the huſband at the time of the marriage, and ſince received ſeveral ſums of money amounting together to 800 *l.* as the marriage portion of the ſaid *Mary Chivers*.

The truſtees applied under the commiſſion againſt *Archer*, to prove the bond for 1000 *l.* but the commiſſioners refuſed to admit them, whereupon they preferred this petition to the Lord Chancellor, praying that they might be admitted as creditors, but the petition was diſmiſſed.

CHAP. IX.

COX *v.* LIOTARD.

Dougl. 2d. Ed. 166.

The action was brought upon a policy of inſurance on the life of *J. H. Boyde*, lately gone to the *Eaſt-Indies*, on the event of his dying between the 5th of *April* 1780, and the 5th of *April* 1783. The defendant pleaded, 1ſt. bankruptcy generally, and that

that the cauſe of action accrued before the bankruptcy. 2dly. That the policy was made prior to the time of his becoming a bankrupt, then the trading, act of bankruptcy, petitioning creditor's debt, commiſſion, proceedings and certificate ſpecially, and that he was thereby diſcharged from the ſaid policy and all debts due at the time of the bankruptcy, without ſaying that the cauſe of action accrued before the bankruptcy. To this laſt plea there was a general demurrer. It was inſiſted for the plaintiff that this was a contingent debt, and not within the 19 *G.* 2. *c.* 32. *ſ.* 2.

Lord Mansfield,—Though the preamble does not mention inſurances of this ſort, yet they are within the ſame miſchief, and the enacting words are ſufficient to comprehend them. The ſtatute 7 *G.* 1. is ſimilar to this, and the caſe of *Pattiſon* v. *Bankes*, is in point.

Buller, J.—In *Mace* v. *Caddell*, it was determined that the general enacting words of 21 *J.* 1. *c.* 19. *ſ.* 11. are not reſtrained by the particular words of the preamble. Judgment was pronounced for the defendant.

HESKUYSON *v.* WOODBRIDGE.

Dougl. 166. 2*d. ed.*

On the 13th of *June*, 1782, the defendant applied to the plaintiff to accept a bill for 300*l.* which they would draw upon him and which he did, not having any effects of theirs in his hands. The bill being endorſed over by the defendants and becoming due on the 10th of *Auguſt*, the plaintiff then paid it. At the time when it was drawn, the defendants gave the plaintiff a paper in the following words:—— "Received the 13th of "*June*, 1781, of Mr. *R. D. Heſkuyſon*, his ac-

"ceptance for 300 *l.* due the 16th of *Auguſt*, "which we promiſe to pay when due. *John* "*Woodbridge* and Co." On the 22d of *July*, the defendants became bankrupts and afterward obtained their certificate.

Lord *Mansfield*.—The note was clearly nothing but an indemnity to the plaintiff, againſt the conſequence of his acceptance.

Buller, J.—This caſe is not diſtinguiſhable from *Chilton* and *Whiffin*, the money was not payable at all events in the preſent caſe to the plaintiff. The defendant might have taken up the bill, and then the plaintiff would have had no demand againſt them. Judgment was pronounced for the plaintiff.

PAUL *v.* JONES.

1 *Term Rep.* 599.

One *Jones* being indebted to *Hemming* and *Smith*, in 90 *l.* prevailed on the plaintiff and two others to join with him in *January*, 1785, in giving a warrant of attorney to confeſs judgment for that ſum, with a defeazance thereon, in caſe the debt was paid by three inſtalments of 30 *l.* each, in two, four, and ſix months. Default was made in payment. In *November*, 1785, the defendant became a bankrupt; and in *December*, 1786, obtained his certificate. Before the bankruptcy the plaintiff was applied to for payment by *Hemming* and *Smith*, but did not pay any part till afterwards when he paid 44 *l.* The defendant having been held to bail for this ſum, obtained a rule to ſhew cauſe, why he ſhould not be diſcharged out of cuſtody, on filing common bail, on the ground, that this debt might have been proved under his commiſſion.

Aſhhurſt,

Aſhhurſt, J.—The rule of law is, that though a party make himſelf liable for the debt of another, by a contract prior to the bankruptcy of ſuch other perſon, and he does not actually pay that debt till after the commiſſion of bankrupt, he cannot prove his debt under the commiſſion. Here it was not paid till afterwards; and as the debt only accrued by actual payment, there was no debt to which he could ſwear at the time of the bankruptcy.

Buller, J.—The two leading caſes are *Goddard* v. *Vanderheyden*, and *Young* and another v. *Hockley*, where the court held, that inaſmuch as the money was not actually paid before the bankruptcy, the debt ſhould not be barred by the bankrupt's certificate.

Thoſe two caſes have been followed and recognized by many ſubſequent determinations; till the money is paid, the party cannot prove his debt under the commiſſion.

The caſe of *Brooks* and *Lloyd* does not apply here. The bond in that caſe came within the ſtatute of 7 *G.* 1. and it was the ſame as if it had been given by one defendant alone, for both were principals, but here as this money was not paid by the plaintiff who was only a ſurety, till after the bankruptcy, the defendant is not entitled to be diſcharged.

CHAP. X.

Ex parte HODGSON.

2 *Bro.* 5.

Burney the bankrupt, was partner with *Davidſon*, who was in the *Eaſt Indies*, and, being indebted ſeparately to—to whom he had given a note, ſhe preſſed him for a better ſecurity, upon which he gave her a

partnerſhip note. Upon a ſeparate commiſſion againſt *Burney*, ſhe proved this note, and the preſent petition was, that the proof of this joint debt upon the ſeparate commiſſion might be reſcinded.

Lord Chancellor refuſed the prayer of the petition, there being no diſtinction as to the joint or ſeparate debts, and ſaid he thought proper to declare that debts, whether ſole or joint, ought to be paid out of the bankrupt's eſtate, which is compoſed of his ſeparate eſtate, and of his moiety of the joint eſtate, and therefore ordered that ſhe ſhould come in *pari paſſu* with the ſeparate creditors.

Ex parte PAGE.

2 *Bro.* 119.

William Page petitioned to be admitted to prove under a ſeparate commiſſion taken out againſt *Samuel Remnant*.

Before the date and ſuing forth of the commiſſion againſt *Remnant*, he together with one *James Hicks*, being jointly concerned in an attempt to raiſe the *Royal George*, the petitioners at the requeſt and joint account of the bankrupt, and the ſaid *James Hicks*, ſeverally furniſhed divers goods and materials, for and in the proſecution of ſuch their deſign, whereby they became indebted to the petitioners as follows: To *Page* 60*l.* 4*s.* 1*d.* *White* 90*l.* 7*s.* 11*d.* *Parmeter* 41*l.* 3*s.* and *Stephens* 45*l.* 10*s.* 6*d.* The 14th *Auguſt*, 1784, a ſeparate commiſſion was taken out againſt *Remnant*.

The commiſſioners refuſed to let the creditors prove becauſe they were joint debts.

This matter had been much argued, but at length the Lord Chancellor made the following order,

That

That the petitioners be at liberty to go before the major part of the commiſſioners, named in the commiſſion iſſued againſt *Remnant*, to prove their ſeveral and reſpective debts, and be admitted creditors under the ſaid commiſſion, for ſuch ſums as they ſhall ſo prove reſpectively, and be paid out of the eſtate and effects of the ſaid *Remnant*, a dividend in reſpect thereof, ratably and in equal proportions with the reſt of the creditors of the ſaid bankrupt.

Ex parte FLINTUM.

Bro. 120.

On the 12th *May*, 1773, *Dunn* and *Oyſton* became partners, and on the 24th *January*, 1783, the partnerſhip was diſſolved. During the partnerſhip they borrowed ſeveral ſums of money upon their joint bonds and promiſſory notes for the purpoſe of carrying on their trade. On the 5th of *January*, 1785, a ſeparate commiſſion iſſued againſt *Oyſton*, the preſent petitioners were joint creditors, and now prayed to be admitted to prove their joint debts, under the ſeparate commiſſion againſt *Oyſton*.

Lord Chancellor ſaid, he thought the point was ſettled that the joint creditors might prove under the ſeparate commiſſion, eſpecially ſince the caſe Ex parte *Criſp*, 1 *Atk.* 133. which had decided that joint creditors might ſue out a ſeparate commiſſion.

The order was the ſame with Ex parte *Page*, but there having been previous dividends, it was added that they ſhould not be diſturbed.

Ex parte COPLAND.

24th Dec. 1787.

The bankrupt *Robert Jackſon*, and one *Edmund Jackſon*, both of the iſland of *Jamaica*, merchants, were indebted unto *John Yate*, and *Thomas Yate*, co-partners in trade, in the ſum of 7654 *l.* 13 *s.* 8 *d*¼. for the value of a cargo of negro ſlaves, which cargo of ſlaves the ſaid *Robert Jackſon*, and *Edmund Jackſon*, ſold and diſpoſed of in the ſaid iſland of *Jamaica*, on the account of the ſaid *John Yate*, and *Thomas Yate*, on commiſſion, and for the proceeds of which cargo of ſlaves amounting to the ſum aforeſaid, the ſaid *Robert Jackſon*, and *Edmund Jackſon* guaranteed the payment, in conſideration of the commiſſion which they received on the ſales thereof.

The ſaid *Robert Jackſon*, and *Edmund Jackſon*, in order to ſecure the payment of the aforeſaid ſum of money, at ſtipulated times entered into two ſeveral bonds or obligations, bearing date reſpectively the 29th day of *October*, 1776, by one of which they became jointly held and firmly bound unto the ſaid *John Yate*, and *Thomas Yate*, in the penal ſum of 10,514 *l.* 17 *s.* 8 *d*¼. current money of the iſland aforeſaid, with a condition thereunder written, making void the ſame on payment of the ſum of 5257 *l.* 8 *s.* 10 *d*¼. current money of *Jamaica*, (part of the ſaid ſum of 10,514 *l.* 17 *s.* 8 *d*¼.) at and on the 29th day of *October*, in the year of our Lord 1779, with lawful intereſt to commence when due. And by the other bond or obligation they became jointly held and firmly bound unto the ſaid *John Yate*, and *Thomas Yate*, by the like name of *John Yate*, and Co. in the penal ſum of 10,514 *l.* 17 *s.* 8 *d.* current money of the iſland of *Jamaica*, with a condition thereunder written, making void

void the laſt mentioned bond, on payment of the ſum of 5257 *l.* 8 *s.* 10 *d.* current money of *Jamaica*, being the remaining part of the ſaid ſum of 10,514 *l.* 17 *s.* 8 $d\frac{1}{4}$. at or on the 29th day of *October*, in the year of our Lord 1780, with lawful intereſt to commence when due.

The ſaid *John Yate*, and *Thomas Yate*, formed a partnerſhip with *Thomas Spencer Dunn*, and *Samuel Hilton Parker*, and all the ſaid partners becoming inſolvent, a commiſſion of bankruptcy on the 17th day of *May*, 1777, iſſued againſt them, whereupon they were declared bankrupts, and their eſtate and effects duly aſſigned to *Peregrine Cuſt*, *Samuel Galton* the younger, *Joſeph Dalton*, and *John Copland*, who were duly choſen aſſignees of the eſtate and effects of the ſaid bankrupts.

The aſſignees ſent the two bonds to *Jamaica*, to procure payment of the money ſecured thereby, and judgments were obtained on the ſaid bonds againſt the ſaid *Robert Jackſon*, and *Edmund Jackſon*, in one of the courts of the iſland of *Jamaica*, but no money was ever recovered on the ſaid judgments or either of them.

The ſum of 10,514 *l.* 17 *s.* 8 $d\frac{1}{4}$. current money of *Jamaica*, (being equal to the ſum of 7654 *l.* 13 *s.* 8 $d\frac{1}{4}$. of lawful money of *Great Britain*,) together with lawful intereſt of the iſland of *Jamaica*, on the ſaid bonds, from the reſpective times of their becoming payable to the date of the commiſſion againſt the ſaid *Robert Jackſon*, remained juſtly due and owing from the ſaid *Robert Jackſon*, and *Edmund Jackſon*, to the ſurviving aſſignees.

Robert Jackſon, came from *Jamaica* to *England*, and a commiſſion of bankrupt was on or about the 24th day of *October*, 1787, awarded and iſſued againſt him, under which he was duly declared bankrupt.

On the eighth of *December*, 1787, the petitioners by their ſolicitor attended the commiſſioners, for the purpoſe of proving the reſpective debts before mentioned, but the commiſſioners refuſed to permit ſuch debts or either of them, to be either proved or claimed, becauſe they appeared to be joint debts of the ſaid *Robert Jackſon*, and *Edmund Jackſon*, and not ſeparate debts of the ſaid *Robert Jackſon*.

See the Caſes of Steph. v. Brown and Matthew v. Aland, cited in Fitzgibbon, 283.

Upon hearing the petition his Lordſhip declared, that a joint creditor of two or more co-partners in trade, is to be at liberty to prove ſuch joint debts, under a ſeparate commiſſion of bankrupt againſt one of ſuch co-partners, and he ordered that the petitioners ſhould be at liberty to go before the major part of the commiſſioners named in the commiſſion of bankrupt iſſued againſt the ſaid *Robert Jackſon*, to prove ſuch joint debts as they may be adviſed, and be admitted creditors under the ſaid ſeparate commiſſion, for ſuch joint debts which they ſhall ſo prove, and be paid a dividend in reſpect thereof, ratably and in equal proportion with the ſeparate creditors of the ſaid *Robert Jackſon*, ſeeking relief, under the ſaid commiſſion, but ſo as not to diſturb any dividend or dividends already made under the ſaid commiſſion.

Ex parte TATE.

4th Feb. 1787.

On 1ſt of *April*, 1783, a ſeparate commiſſion iſſued againſt *James Grant*, deſcribing him as partner of *Peter Grant*, then of the iſland of *Jamaica*. The commiſſion was iſſued upon a joint debt. *Peter Grant* was then in the *Weſt-Indies*; on the return of *Peter Grant*, from the *Weſt-Indies*, on the

22d of *December*, 1783, a ſeparate commiſſion upon the petition of a joint creditor iſſued againſt him, deſcribing him as partner of *James Grant*. The ſame perſons were choſen aſſignees under both commiſſions. The joint creditors proved their debts under both commiſſions, and the ſeparate creditors under each reſpectively. The aſſignees poſſeſſed themſelves of the joint and ſeparate eſtates. Upon a petition to keep ſeparate accounts, and pay the joint debts with the joint fund, and ſeparate debts with the ſeparate fund, the order was made upon conſent of the aſſignees.

Ex parte HAYWARD.

14*th Auguſt*, 1745.

James Hayward one of the aſſignees of the bankrupt, on behalf of himſelf and creditors, preferred his petition ſtating, that the bankrupt in *May*, 1740, entered into articles of co-partnerſhip with *Hubert Taſſel*, of *London*, merchant, for the term of three years, during which time it was expreſsly ſtipulated, that neither of the ſaid parties ſhould carry on or employ himſelf in any trade or buſineſs, or hold or occupy any poſt or employment for his own benefit or private account, ſeparate and apart from the co-partnerſhip, but each was to bring all to a joint account without fraud or concealment.

Hubert Taſſel, and *Henry Hutchinſon*, entered into a contract with the commiſſioners, for the victualling his majeſty's navy, to provide and ſupply the ſquadron under the command of admiral *Anſon*, with proviſions and neceſſaries during his voyage to the *South Seas*, and *Eaſt Indies*.

They went with the admiral on the expedition, and ſupplied the ſquadron with proviſions according to their contract, and continued with him until

til they arrived at *Canton*, in *China*, where *Hubert Taſſel* left the admiral, and ſhipped himſelf on board a ſhip belonging to the *Eaſt India* company, and arrived in *England*.

Henry Hutchinſon the bankrupt, continued with the admiral and ſupplied the ſhips under his command, till his arrival in *England*, and after the departure of the ſaid *Hubert Taſſel*, and before the arrival of the ſaid bankrupt in *England*, the ſaid partnerſhip expired, and the bankrupt continued to ſupply the ſhips with proviſions, and great commiſſions and profits accrued after the time of the expiration of the ſaid partnerſhip.

During the continuance of the partnerſhip and before they left *England* on the voyage, they contracted in partnerſhip large debts, and for ſecuring the re-payment thereof, they executed bonds in the nature of bottomree bonds whereby they became jointly and ſeparately bound in large penalties.

The petition then ſtates that the joint creditors had proved their whole debts under the ſaid commiſſion, and had voted for the choice of aſſignees, and by that means procured two of their own body to be choſen, together with the petitioner, who was a ſeparate creditor, and that the joint aſſignees were acting for the benefit of the joint creditors, in prejudice to the ſeparate creditors.

The petition (amongſt other things) prayed that all the joint creditors might be excluded from having or receiving any dividend out of the ſeparate eſtate of the bankrupt, or that the whole eſtate of the bankrupt might be divided equally among all the creditors.

Whereupon after having the matter debated by counſel, it was ordered that it be referred to the major part of the commiſſioners named in the ſaid commiſſion, to take diſtinct accounts of the ſeparate eſtate and effects of the ſaid *Henry Hutchinſon*, the

the bankrupt, in partnerſhip with the ſaid *Hubert Taſſel*, and alſo diſtinct accounts of the joint and ſeparate debts, diſtinguiſhing the joint and ſeparate eſtates of the ſaid bankrupt from each other. And that what ſhall be found to belong to the ſaid bankrupt, in reſpect of his ſhare and proportion of the partnerſhip eſtate, be applied by the aſſignees, in the firſt place towards ſatisfaction of his partnerſhip creditors, and that what ſhall be found to belong to the ſeparate eſtate of the ſaid bankrupt, be applied by the ſaid aſſignees, in the firſt place towards ſatisfaction of the ſeparate creditors.

Ex parte BURNABY.

4th Feb. 1746.

In ex parte *Burnaby* the petition ſtates that *Burnaby*, together with *James Barbutt*, and *William Criſpe*, became entitled as co-partners to *Ranelagh*, in the proportions mentioned in the agreement ſubſiſting between them, and that *James Barbutt*, aſſigned over his proportion to *Burnaby*.

That on the 1ſt of *February*, 1742, a ſeparate commiſſion iſſued againſt *Criſpe*, at the inſtance of *William Perritt*, for a debt contracted on the partnerſhip account, and he was declared a bankrupt.

That the petitioner and ſeveral other creditors of the ſaid partnerſhip, proved their debts under the ſaid commiſſion to the amount of four thouſand and ſix pounds, fourteen ſhillings, whereof the ſum of three hundred and fifty pounds, was a debt proved by the petitioner, and due to him from the partnerſhip eſtate of *Criſpe*.

That on the 27th of *June*, 1745, the commiſſioners ordered a dividend of fifteen ſhillings in the pound to ſuch of the creditors who proved their debts under the ſaid commiſſion.

That

That after payment of the ſaid dividend of fifteen ſhillings in the pound, amongſt the abovementioned creditors there would remain a large ſum of money received by the aſſignees, on ſale of the bankrupt's ſhare of the ſaid partnerſhip eſtate, ſufficient to diſcharge all the partnerſhip debts.

That ſeveral of the ſeparate creditors of the ſaid bankrupt, had ſince the ſaid order of dividend claimed conſiderable ſeparate debts, and the petitioner was informed that if fifteen ſhillings ſhould be paid to ſuch ſeparate creditors, the ſame would exhauſt all the money in the hands of the aſſignees, but the petitioner was adviſed that as the money in the aſſignees' hands, was the produce of the ſaid partnerſhip eſtate, the ſame ought in the firſt place to be applied in payment of the partnerſhip debts.

Lord *Hardwicke* upon hearing counſel for the petitioner, and the aſſignees, ordered, that the eſtate and effects of the ſaid bankrupt, in partnerſhip with *Burnaby* and *Barbutt*, be applied by the aſſignees under the ſaid commiſſion, in the firſt place towards ſatisfaction of the partnerſhip debts, and that the ſeparate eſtate and effects of the ſaid bankrupt, be applied by the ſaid aſſignees in the firſt place towards ſatisfaction of his ſeparate debts.

Ex parte MARLIN.

2 *Bro.* 15.

In 1771 *Thomas Pettit* had ſeparate creditors.

In 1772, *Pettit* and *Flight* became partners.

In 1781 *Pettit Flight* and *Runnington* became partners.

In

In *November* 1785, a commiſſion of bankruptcy iſſued againſt the laſt three.

This was a petition for ſeparate accounts of the three eſtates. Though the court did not know any inſtance, of dealing in the firm of two partners forming part of the firm of three, the prayer of the petition was granted, and it was ordered that it be referred to the major part of the commiſſioners, named in the commiſſion iſſued againſt the ſaid bankrupts, *Thomas Pettit*, *John Runnington*, and *Richard Flight*, to keep diſtinct accounts of the joint eſtate and effects of the ſaid bankrupts *Thomas Pettit*, *John Runnington* and *Richard Flight*, and of the joint eſtate and effects of the ſaid *Thomas Pettit* and *Richard Flight*, and of the ſeparate eſtates and effects of each of the ſaid bankrupts, and that the ſeveral creditors on each of the ſaid ſeveral eſtates, be admitted to prove their reſpective debts under the ſaid commmiſſion againſt the ſaid bankrupts, *Thomas Pettit*, *John Runnington* and *Richard Flight*, and that each of the ſaid reſpective eſtates be applied, in ſatisfaction of the creditors of each reſpective eſtate, and the ſurplus, if any, of each reſpective eſtate, after full payment and ſatisfaction of the debts on ſuch eſtate, be carried over to and conſtitute part of the joint eſtates of the ſaid bankrupts, *Thomas Pettit*, *John Runnington*, and *Richard Flight*, and the coſts of this application to be paid out of the joint eſtates of the ſaid three bankrupts, and the coſts of keeping the ſaid ſeveral diſtinct accounts were directed, to be borne and paid out of each of the ſaid reſpective eſtates, according to the proportions which in the judgment of the ſaid commiſſioners, the ſame ought to be borne and paid by each of the ſaid eſtates.

CHAP.

CHAP. XI.

Ex Parte DEVINE *and* MARY *his Wife.*

13th January, 1776.

In a ſubſequent caſe the facts were, that on the 18th of *October*, 1769, a commiſſion of bankrupt iſſued againſt *Michael Young*. At the time of the bankruptcy, he was indebted to the petitioners in right of *Mary*, the wife of *Devine*, ſhe being the repreſentative of *Samuel Bates*, a mortgagee of the bankrupt's eſtate and on other accounts. There being a diſpute relative to the mortgage, a bill was brought by the aſſignees, and in 1772, a decree was made for redemption.——After much altercation, matters relative to the mortgage were ſettled, the money paid and the eſtate reconveyed to the aſſignees; but there ſtill remaining due to the petitioners, 192 *l.* 7 *s.* 6 *d.* for money lent, and 31 *l.* 10 *s.* for a year's rent due at the time of the bankruptcy, and the petitioners having omitted to prove the debt under the commiſſion pending the diſpute, and to diſtrain for the rent, while the effects of the bankrupt were upon the premiſſes, and which had been ſince removed and ſold, and a dividend of 5 *s.* in the pound having been made to the other creditors, they applied to the court to be admitted creditors, both for the debt and the rent, and to receive a dividend of 5 *s.* in the pound for the ſame, to be made equal with the other creditors, and to be paid ratably for the future out of the remaining effects of the bankrupt. Though the petition was ſo framed, yet it was taken up at the hearing, and argued that

that the petitioners were entitled to be paid the year's rent in preference to the other creditors, on the equity of the ſtatute 8th of Queen *Ann*, which in caſe of execution of the goods of the tenant gives the landlord a year's rent.

It was ſuggeſted that the aſſignees had promiſed payment of the rent, but that was poſitively denied, and the queſtion was taken up, depending entirely upon the point of law.

For the petitioners it was argued, that a commiſſion of bankrupt is an execution, and within the ſtatute of Queen *Anne*, and has been ſo conſidered. *Ex parte Plummer*, 1 *Atkyns*, 103. 2 *Blackſtone's Commentaries*, 487.

On the other ſide it was ſaid, that the ſtatute of *Anne* does not extend to caſes of bankruptcies, that the remedy of the landlord is not taken away by any of the ſtatutes of bankrupts, but remains as it was before at common law, notwithſtanding the commiſſion and aſſignment: that is, he may diſtrain the goods while they remain on the premiſſes for any arrear of rent.

Lord *Bathurſt*, Chancellor.—After taking time to conſider, ſaid, It was a queſtion of conſequence, and if he was not very clear in his opinion, he ſhould put it in a way to be determined at law, eſpecially after what Mr. Juſtice *Blackſtone* had ſaid in his Commentary, in which he thought him miſtaken. The law is laid down by Lord *Hardwicke*, in the caſe *ex parte Plummer*, 1 *Atkyns*, 103. He ſays, the landlord may diſtrain for rent at any time after the commiſſion and aſſignment, while the goods remain upon the premiſſes. He ſaid he had ſeen the order itſelf which agrees with that opinion, and he therefore ordered the petitioners to come in as creditors under the commiſſion.——His Lordſhip in making the order alſo obſerved, that Lord *Hardwicke*'s opinion

nion in *ex parte Grove*, was founded on the circumſtance of the goods having been ſold, and that he took no notice of the landlord's having proved under the commiſſion, which appears from the report in *Atkyns* to have been relied on by him.

Ex Parte WARDELL,

29*th March*, 1787.

Previous to the month of *December*, 1778, *John Dyer* was indebted to *Wardell*, in the principal ſums of 500 *l.* and 200 *l.* and to ſecure the repayment thereof, with lawful intereſt for the ſame, he mortaged to him certain copyhold eſtates. On the 25th of *April*, 1776, *Dyer* became a bankrupt, and at the time of iſſuing the commiſſion was indebted to *Wardell*, in the ſaid two ſums of 500 *l.* and 200 *l.* with an arrear of intereſt due thereon. The mortgage was an inſufficient ſecurity for the principal and intereſt, and therefore the petition prayed that the commiſſioners might proceed to a ſale of the mortgaged premiſſes, and that the money ariſing by the ſale, might be applied to the payment of the mortgage money and intereſt due and to grow due on the mortgage together with the coſts, and that the petitioner might be at liberty to prove the remainder of his debt under the commiſſion, and receive a dividend with the other creditors. The aſſignees were ſerved but did not appear. It was contended for the mortgagee, that he was intitled to his intereſt to the time of the ſale, but,

The Lord Chancellor referred it to the commiſſioners, to take an account of the principal and intereſt due to the petitioner and to tax his coſts, and

and directed that the commiſſioners in taking ſuch account, ſhould diſtinguiſh what intereſt incurred after the bankruptcy; and then the eſtate ſhould be ſold, and the monies to ariſe from the ſale ſhould be applied in payment of what ſhould be found due to the petitioner for principal, intereſt, and coſts, and in caſe the ſame ſhould be inſufficient for the payment of the principal and of the intereſt to the time of the bankruptcy and alſo of the coſts, the petitioner ſhould be admitted a creditor under the commiſſion, for the deficiency of what ſhould be found due to him for principal and intereſt to the time of the bankruptcy only, and for his coſts, and be paid a dividend, *&c.*

CHAP. XI.

Ex parte LLEWELLYN, *In the Matter of* WILLIAM MOSELY, *a Bankrupt.*

Tueſday Aug. 10, 1784.

On the 21ſt *Sept.* 1772, *Sarah Clempſon*, and *William Moſely*, gave a joint and ſeveral bond to Mr. *Strad*, for 1000 *l.* conditioned for payment of 500 *l.* and intereſt, and on the ſame day *Sarah Clempſon* gave a ſeparate bond to *Strad*, for 3100 *l.* and intereſt; theſe bonds were aſſigned by *Strad*, and the petitioner *Mary Llewellyn*, became entitled to the benefit of the aſſignment. In 1773, *Sarah Clempſon* died, and *William Moſely* her brother, and next of kin, took out letters of adminiſtration. She left effects to pay the bonds. On the 20th of *Dec.* 1782, a commiſſion of bankrupt iſſued againſt *Moſely*, and *Warren*, and others were choſen aſſignees. *Moſely* died in 1783, without having obtained his certificate. His aſſignees obtained adminiſtration of *Sarah Clempſon*'s effects unadminiſtered. The

petition prayed, that it might be referred to the commiſſioners named in the ſaid commiſſion againſt the ſaid *William Moſely*, or to one of the maſters of the court, to take an account of what was due to the petitioner for principal and intereſt on the ſaid bonds, and alſo to inquire what part of the ſaid *Sarah Clempſon*'s eſtate and effects came to the hands of the ſaid *William Moſely*, deceaſed; and whether any, and what part of ſuch eſtate and effects of the ſaid *Sarah Clempſon* remained in ſpecie and unapplied in his hands, at the time of his bankruptcy, and what part thereof remained outſtanding and unreceived by the ſaid *William Moſely*, at the time of his bankruptcy, and what part thereof came to the hands of his ſaid aſſignees reſpectively, and that the ſaid maſter might appoint a receiver of the eſtate and effects of the ſaid *Sarah Clempſon* deceaſed, and that the ſaid *Warren* and other aſſignees of the eſtate, debts and effects of the ſaid *William Moſely*, and adminiſtrators of the goods and effects unadminiſtered of the ſaid *Sarah Clempſon* as aforeſaid, might be ordered to deliver or pay over to ſuch receiver, ſuch part of the ſaid *Sarah Clempſon*'s effects as ſhould be found to have been received by them, or to be in their hands; and that the petitioner or ſuch receiver as aforeſaid on behalf of the petitioner, might be admitted a creditor on the eſtate of the ſaid *William Moſely*, for the balance of the eſtate and effects of the ſaid *Sarah Clempſon*, in his hands at the time of his bankruptcy, and that thereout and out of the eſtate and effects of the ſaid *Sarah Clempſon* remaining in ſpecie, and unapplied at the time of the bankruptcy, the petitioner might be paid what is due for principal and intereſt on the ſaid bonds, and the coſts of the application and the proceedings under or in conſequence of the ſame in a courſe of adminiſtration, and that the petitioner might be admitted a creditor for the reſidue

reſidue of her ſaid debt on the eſtate and effects of the ſaid *William Moſely*.

Upon hearing counſel for the petitioner, it was referred to Mr. *Leeds*, one of the maſters of the court of Chancery, to take an account of what part of the eſtate and effects of the ſaid *Sarah Clempſon* came to the hands of the ſaid *William Moſely*, before the date and ſuing forth of the commiſſion of bankruptcy againſt him, and what part thereof hath ſince come to the hands of the aſſignees under the ſaid commiſſion; in the taking of which account, the ſaid aſſignees and all proper parties were to be examined upon interrogatories, or otherwiſe, as the ſaid maſter ſhall think fit, and to produce before the ſaid maſter, upon oath, all books of account, deeds, papers and writings, in their reſpective cuſtody or power, as the ſaid maſter ſhall direct. It was ordered, that if on the taking the ſaid account, any part of the eſtate and effects of the ſaid *Sarah Clempſon* ſhould appear to be remaining in the hands of the ſaid aſſignees in ſpecie, that the ſaid aſſignees ſhould deliver the ſame over to the petitioner, and if any part of the effects of the ſaid *Sarah Clempſon* which came to the hands of the ſaid aſſignees, or any of them, had been ſold or diſpoſed of by them, it was ordered, that they ſhould account for, and pay over, the value thereof to the petitioner, and that the petitioner ſhould be admitted a creditor under the ſaid commiſſion, for the amount of ſuch effects of the ſaid *Sarah Clempſon* as ſhould appear to have been received by the ſaid bankrupt, or the aſſignees under the ſaid commiſſion, and that the dividends to be made thereon under the ſaid commiſſion, ſhould be paid by the ſaid aſſignees into the Bank, ſubject to further order. And it was ordered, that the petitioner in the mean time ſhould be at liberty to go before the major part of the commiſſioners named in the ſaid commiſſion, to prove the ſum of 500*l.* upon the bond men-

tioned in the ſaid petition to have been entered into by the ſaid *Sarah Clempſon* and *William Moſely*, the bankrupt, to *William Stead*, and be admitted a creditor under the commiſſion for the ſame, and the intereſt thereon to the time of the date of the ſaid commiſſion, and be paid by the ſaid aſſignees a dividend or dividends in reſpect thereof, ratably and in equal proportion with the reſt of the ſaid bankrupt's creditors ſeeking relief under the ſaid commiſſion.

Ex parte BOARDMAN.

2*d Auguſt*, 1786.

Upon a petition by ſeparate creditors to be allowed intereſt on their debts carrying intereſt, before the ſurplus of the ſeparate eſtate ſhould be carried over to the joint account; it appeared that a joint commiſſion had been taken out againſt two bankrupts, and an order obtained for keeping diſtinct accounts, and that there was a ſurplus of the ſeparate eſtate of one of them, after paying his ſeparate creditors twenty ſhillings in the pound. But the Lord Chancellor was of opinion, that ſuch ſeparate creditors were not intitled to intereſt, unleſs the joint eſtate had alſo paid twenty ſhillings in the pound, and therefore diſmiſſed the petition.

CHAP. XII.

WORRAL *v.* MARLER. BUSHNAN *v.* PELL.

1 Cox's P. W. 459.

In the two cauſes of *Worrall* v. *Marlar* and *Buſhnan* v. *Pell* which came on to be heard in *Lincoln's Inn Hall December* 16th 1784, it appeared that *Sarah Worrall*, the wife of *John Worrall*, by her next friend, was plaintiff in the firſt cauſe, and *John Mar-*

lar and *John Markett* executors of *James Pell* deceaſed, the ſaid *John Worrall* and *Joſeph Buſhnan* aſſignees of the effects of *John Worrall* were defendants, and in the croſs cauſe, *Buſhnan* was plaintiff, and *James Pell* the younger, ſon and heir of *James Pell* the teſtator, *John Marlar*, *John Markett*, *John Worrall*, and *Sarah* his wife, were defendants. The caſe was this: *James Pell* the teſtator who was the father of *Sarah Worrall* by bond, dated 10th of *November* 1737, and made previouſly to his marriage with *Elizabeth Markett*, the mother of *Sarah Worrall*, became bound to *John Markett*, in the penal ſum of 20,000 *l.* conditioned (amongſt other things) for payment of one full third part of ſuch real and perſonal eſtate as he ſhould die ſeiſed or poſſeſſed of, unto the ſaid *John Markett* in truſt for ſuch of the children of the marriage as ſhould be living at his death, to be equally divided between them. The teſtator had two children who ſurvived him, *Sarah Worrall* and *James Pell* the younger. *Sarah* married the defendant *John Worrall* in her father's life-time, without his conſent, and without any fortune or ſettlement. Sometime after this marriage, *John Worrall* in 1778, took the benefit of an inſolvent debtors act, and an aſſignment of his eſtate and effects was duly executed to *Buſhnan*, one of his principal creditors. *James Pell* the father died in *December* 1781, and by will gave to *Sarah Worrall* 8000 *l.* in lieu of what ſhe might claim out of his real and perſonal eſtate under the bond. *Sarah Worrall* filed her bill, ſtating theſe ſeveral matters, and offering to accept the 8000 *l.* and praying that the ſame might be laid out and ſettled to her ſeparate uſe, and that ſome proviſion might be made thereout for her children. *Buſhnan* filed the croſs bill claiming as aſſignee, to be entitled to ſuch election, as the ſaid *John Worrall* would be entitled to make under the ſaid will or bond, in

caſe he had not become inſolvent, and praying an account of the real and perſonal eſtate of the teſtator *James Pell*, and that he might be at liberty to make his election under the decree of the court. On the hearing, the account was directed, and all further conſiderations reſerved. By the report it appeared, that the ſixth part of the real and perſonal eſtate amounted to much leſs than the legacy of 8000 *l.* On hearing theſe cauſes for further directions before Lord *Thurlow*, his Lordſhip directed that *John Worrall* ſhould make a propoſal to the Maſter for a ſettlement on his wife, and the iſſue of the marriage; which was done, and the propoſal approved by the Maſter. But *Buſhnan* excepted to the report, for that the Maſter had not received any propoſal from him on the part of the creditors, nor had given them any intereſt in the fund, and on the argument of the exceptions it was inſiſted on the part of the creditors, that the intereſt which *Worrall* had in this fund, in right of his wife, paſſed under the inſolvent act to *Buſhnan* the aſſignee, and that the Maſter ought therefore to have received propoſals from *Buſhnan* as well as *Worrall* and that the rehearings and exceptions ſhould come on together. And now upon argument of the caſe, his Lordſhip was clearly of opinion that the intereſt of *Sarah Worrall* was aſſignable. But in the next place, with reſpect to the equity of the wife as againſt the huſband's creditors, his Lordſhip thought the claim of the creditors muſt be confined to the intereſt taken under the bond, (ſince no benefit accrued under the will until after the aſſignment) and as to ſo much, that the aſſignees ought to make propoſals to the Maſter for making ſome proviſion for the wife and children. His Lordſhip added, that he had conſidered the ſeveral caſes upon this ſubject, and did not find it any where decided, that if the huſband

make

make an actual assignment by contract for a valuable consideration, the assignee should be bound to make any provision for the wife out of the property assigned, but that a court of equity has much greater consideration for an assignment actually made by contract than for an assigment by mere operation of law; for as to the latter his lordship's opinion was, that when the equitable interest of the wife was transferred to the creditors of the husband by mere operation of law, (as in the present case) he stood exactly in the place of the husband, and was subject precisely to the same equity, in respect of the wife. In pursuance of this order, *Bushnan* and *Worrall* laid proposals before the Master, and it appearing that the 8000 *l.* had been laid out in the purchase of 14,285 *l.* 14 *s.* 6 *d.* 3 *per cent.* bank annuities, of which sum 11,858 *l.* 9 *s.* was purchased with the amount of the one sixth part of the real and personal estate of the testator. *Bushnan* proposed that one moiety of the said sum of 11,858 *l.* 9 *s.* should be settled on *Sarah Worrall* and her children in manner therein mentioned, and that the other moiety should be paid to *Bushnan* to be distributed amongst the creditors of *Worrall.* And *Worrall* proposed that the moiety of the 11,858 *l.* 9 *s.* together with the residue of the 14,285 *l.* 14 *s.* 6 *d.* should be settled on *Sarah Worrall* for life, to her separate use, and after her death to be paid to her surviving children equally, and if no children should survive her then to be paid to *Worrall.*— And the Master having approved those proposals, the causes were set down for further directions, before the Master of the Rolls, and his Honour directed the said 3 *l. per cent.* bank annuities to be transferred accordingly.

Tudor v. Samyne. 2 Vern. 270. Tanfield v. Davenport Tothill.

Jacobson v. Williams. 1 P. W. 382. Bosvill v. Brander. 1 P. W. 458.

BUCKLEY *v.* TAYLOR.

1 *Term Rep.* 600.

In an action brought by the aſſignee of the bankrupt againſt the defendant, to recover 15 *l.* for work and labour, goods ſold and delivered, money had and received, *&c.* The only circumſtances material to the queſtion were theſe: The bankrupt who had been in the cotton trade, after the act of bankruptcy, on which the commiſſion iſſued, *&c.* entered into an agreement with the defendant, for renting of a ſhop in St. *Helen's*, at the yearly rent of 30 *l.* by which it was ſtipulated, that *Edmund Buckley* ſhould pay half a year's rent in advance: he entered on the 1ſt of *May*, 1787, and not long after, a commiſſion of bankrupt iſſuing againſt him, under which the plaintiff was choſen his aſſignee, his goods were ſold upon the premiſes on the 18th of *October*, 1787. At the ſale the defendant bought goods to the amount of 46 *l.* out of which he retained the ſum of 15 *l.* for half a year's rent, to recover which this action was brought. The defendant ſet up the agreement, and ſhewed a cuſtom in this part of the country, that for cottages, ſhops, *&c.* the half year's rent ſhould be due on the day the tenant entered. This cauſe was tried at the Sittings after laſt Eaſter Term at *Guildhall*, when the jury found a verdict for the defendant. A rule having been obtained, to ſhew cauſe why the verdict ſhould not be ſet aſide, and a new trial granted.

Buller, J.—ſaid this queſtion has been very properly brought before the court, and the caſe has been very well diſcuſſed, with reſpect to the cuſtom of the country. I confeſs it was new to me. On the trial, it was proved to be a common cuſtom in many parts of the kingdom, and particularly

larly in *Norfolk*, and I find on enquiry, that it is a common cuſtom, that the landlord may diſtrain the firſt day. Then there ſeems to be no difference in point of law, between an agreement of this ſort, and the common caſe of a letting for a year. In both caſes, the tenant is to enjoy the premiſes, and the landlord to receive the rent, there is *quid pro quo*. In general the landlord cannot diſtrain till the rent becomes due, but if the agreement be otherwiſe, I ſee no objection to it in point of law. It is true, the bankrupt could not have given a lien on particular goods, becauſe after the bankruptcy he cannot enter into any contract to bind his effects. But he may take a demiſe, and if he does and agrees that the rent ſhall be payable on a particular day, the law gives the landlord a power of diſtraining on that day; that makes the diſtinction between a lien on the premiſes themſelves, and a lien on perſonal goods, the latter can only be made on the property in the goods, but in the former it is a remedy, which the landlord has on whatever goods are found on the premiſes.

Groſe, J.—The queſtion is, not whether the bankrupt himſelf is liable to an action on this agreement, but whether the landlord has the remedy claimed in *rem* on the goods on theſe premiſes. It is admitted by the plaintiff's counſel, that if a year's rent were due, in reſpect of the occupation of the tenant, the landlord would have had a right to diſtrain. Now whether that rent was due or not, depends on the cuſtom of the county, and that is deciſive, for by that cuſtom half a year's rent became due, the inſtant the tenant began to occupy. Therefore the landlord's right of diſtreſs was well founded, and if ſo, he is juſtified in retaining this money, and the rule was diſcharged.

CHAP.

CHAP. XIII.

WARING *and Others*, v. KNIGHT.

Sittings at Guildhall, after Hil. Term, 5 *G.* 3.

In an action by aſſignees for money had and received. The caſe was, that *Sims* the bankrupt and the defendant had dealings together, and the bankrupt failing in his circumſtances, and having committed an act of bankruptcy went to *Gibraltar*, the defendant ſent a power of attorney there to commence a ſuit againſt the bankrupt, which was done and a decree obtained, and his goods taken in execution and ſold, and the debt paid to the defendant, to recover which the preſent action was brought. A point was made, Whether this was not a payment within 15 *Geo.* 2. but as to that Lord *Mansfield* gave no opinion. But he determined, 1ſt, That this action would not lie for money had and received, but that trover was the proper action, for you cannot affirm the act in part, and diſaffirm in the other, and if you affirm the judgment, then it was received to his own uſe, for which *vide* 3 *Lev.* 191. 2dly, That this money being recovered by ſentence in a foreign court, could never be recovered back by the aſſignees, and he mentioned the caſe of *Wilſon*'s bankruptcy determined by Lord *Hardwicke*. The caſe was that he had effects in *Scotland*, and ſome of the creditors had proceeded againſt the effects there (there being a cuſtom in *Scotland*, analogous to the foreign attachment in *London*,) upon which an application was made to the Lord Chancellor to ſtay their proceedings, (the parties who had ſet ſuch proceedings on foot living in *England*.) But Lord *Hardwicke* ſaid, it could not be done, for our bankrupt laws were not in force there, and therefore the parties had a right

right to proceed. But he ſaid, that if the effects there were not ſufficient to ſatisfy the party's debt, and he applied for a dividend under the commiſſion here, in that caſe he would poſtpone him till the reſt of the creditors were paid, in the ſame proportions he had received. And he ſaid the ſame had been determined in a caſe from *Virginia*; our bankrupt laws not extending to any of our foreign ſettlements. He alſo ſaid, it had been for a long while doubted, whether the aſſignees could recover a debt due in a foreign country to the bankrupt, but of late it had been determined they might, (in a caſe at the *Cock Pit*) ſo a debt may be recovered here due to a bankrupt in a foreign country, where the law obtains analogous to our bankrupt laws, which other countries will take notice of, and conſider it in the ſame light as if the bankrupt had made an actual aſſignment. The plaintiffs were nonſuited.

BAMFORD *v.* BARON.

2 *Term Rep.* 594.

In an action of trover brought by the ſheriff for the county of *Lancaſter* againſt the defendants, who had ſeized the goods in queſtion, which formerly belonged to one *Hayes*, after they had been taken in execution at the ſuit of a creditor in *April* 1787, to whom the ſheriff had paid the value. The defendants ſet up two anſwers, 1ſt. An aſſignment dated the 16th *Auguſt* 1786, by *Hayes* to two perſons for the benefit of ſuch of his creditors as would ſign a deed of compromiſe by a certain time, notice whereof had been publiſhed in the country papers. The anſwer given by the plaintiff to this was, that it was agreed that *Hayes* ſhould continue in poſſeſſion till *May* 1787, and account for the profits in the mean time to the

truſtees, and he accordingly continued in the viſible poſſeſſion of the goods after the aſſignment, therefore it was ſaid the transfer was void by the ſtat. 21 *J.* 1. To this the defendant replied, by ſhewing an undertaking by *Hayes* to account to thoſe truſtees for all the profits of the trade from the date of the aſſignment. The plaintiff contended, that neither that undertaking nor the notice in the papers, was ſufficient to ſhew the change of property, and therefore the transfer was void by the aſſignors continuing in poſſeſſion. The next defence ſet up by the defendant was a commiſſion of bankrupt taken out againſt *Hayes* in *January* 1788, which was at the ſuit of the very perſons who were privy to the deed of aſſignment, and who relied on that deed as an act of bankruptcy, under which commiſſion the two truſtees were choſen aſſignees. To this the plaintiff had urged, that the commiſſion of bankruptcy ſuppoſing it had duly iſſued, did not apply, becauſe from the ſeveral dates it appears that the relation did not take place to overhaul the execution. And ſecondly, That it was not competent to the perſons who had ſigned the deed of aſſignment, and were privies to the tranſaction, to ſet it up as an act of bankruptcy whatever any other creditor might do who was no party to it.

The Court after conſulting with all the judges were unanimouſly of opinion, that unleſs poſſeſſion accompanies and follows the deed, it is fraudulent and void, and they were alſo clearly of opinion, that the parties who were privies, and had aſſented to the deed of aſſignment, could not ſet it up as an act of bankruptcy, that the two defences were utterly inconſiſtent, firſt relying on the aſſignment as a *bonâ fide* valid conveyance, and then inſiſting on it as a fraud on the bankrupt laws, and an act of bankruptcy, and they ſaid that Lord *Manſfield* had given

given it as his opinion in *Hooper* v. *Smith*, that those who were privy to a concerted act of bankruptcy could not take advantage of it. 1 Black. 441.

ATKINSON v. MALING.

2 *Term Rep.* 462.

In an action of trover for the ship *Mercury* tried at *Guildhall*, before *Groſe*, J. a verdict was found for the plaintiff, ſubject to the opinion of the court on a caſe in ſubſtance as follows: By indenture dated 16th *March* 1785, *Brown* bargained and ſold the ſhip then at ſea, and aſſigned the grand bill of ſale thereof to the plaintiff for ſecuring the ſum of 2000*l.* already advanced by the plaintiff, and for ſecuring ſuch further ſums as the plaintiff ſhould advance, ſubject to a proviſo or condition therein contained for redemption on payment by *Burn*, on demand by the plaintiff of the money then advanced, or which ſhould thereafter be advanced together with lawful intereſt. The indenture alſo contained a covenant that *Burn* ſhould immediately after the execution thereof, cauſe the ſhip to be inſured and pay the premium, *&c.* and it was thereby agreed, that until default in payment ſhould be made, it ſhould be lawful for *Burn*, to hold the ſhip and take the profits for his own uſe and benefit. It alſo appeared, that the grand bill of ſale was delivered to the plaintiff on the execution of the ſaid deed. On the 23d *March* 1785, inſurance was made by *Burn* on the ſhip at and from *Shields* to *Jamaica*, and back again to *London*. And on the 26th *May* 1785, the following memorandum was made on the back of the policy, and ſigned by all the underwriters. That whereas the within ſhip, having been ſold to *Charles Atkinſon* (the plaintiff), we the

the insurers on this policy do hereby consent and agree, that he shall be entitled to this insurance, the ship having become his property. On the 12th *August* 1785, *Burn* became a bankrupt. In *September* 1785, the ship arrived in *England*, and the plaintiff immediately took possession of her. No actual demand of the money secured by the assignment was proved to be made before the possession of the ship was taken. The defendants who are assignees of *Burn*, converted the ship to their own use.

Ashhurst, J.—The only doubt that can be made arises from the statute 21 *Jac.* 1. but considering the whole of this case and the nature of the property, that statute will not be found to apply to it. The object of the statute was to guard against fraudulent sales, which were intended to give the trader a fictitious credit, and to enable him to commit a fraud on the generality of his creditors. But considering the nature of this property, it is not liable to that objection, nor is it within the mischief intended to be remedied by the act. A mortgage of a ship at sea, is very frequently made, is universally recognized, and ought to be encouraged for the benefit of trade. But from the nature of it, no actual delivery of the thing itself can be made at the time of the mortgage, and therefore a delivery of the grand bill of sale has always been held sufficient to transfer the property. A mortgage of a vessel at sea is not like a mortgage of other species of property, it is warranted by the common course of trade, and the act of parliament did not intend to prevent such conveyances. Then it is said, that a demand ought to have been made, but it appears that the assignees had taken the ship out of the possession of the plaintiff, and sold her, therefore by their own act, they had made a demand unnecessary, and the

the money was not paid when the action was brought.

Buller J.—As to the objection of form, this is not unlike the caſe put in *Co. Litt. ſ.* 71. where it is ſaid, that if a man lends ſheep to another to depaſture and he deſtroy them, the lender may maintain treſpaſs againſt the other, without making any demand of the ſheep, becauſe no demand is neceſſary where the thing is deſtroyed. Now here the aſſignees had ſold the ſhip, and ſo no demand was neceſſary. The property of the ſhip by the bill of ſale was veſted in the plaintiff, and whenever that is deſtroyed, trover will lie for it without any regard to the proviſo or a demand of the money. Then on the general queſtion, whether this conveyance is void under either of the ſtatutes of *James* the Firſt, or *Elizabeth*, it has been eſtabliſhed by a variety of caſes, beginning with that of *Ryall* v. *Rolle*, that if a ſhip be ſold whilſt at ſea, the delivery of the grand bill of ſale amounts to a delivery of the ſhip itſelf, it is the only delivery which the ſubject matter is capable of. The bill of ſale is the only muniment of the property, by the vendee's taking that, he prevents the vendor from defrauding others. Then how can it be ſaid, that any falſe colours were held out to the world in this caſe, the plaintiff took poſſeſſion of the ſhip the firſt moment ſhe arrived in port. And as to the agreement itſelf there is no objection to it, I conſtrue it differently from the defendant's counſel, it is more in favour of the creditor than that of the debtor, for the money is payable on demand, which is ſtronger than if the ſhip had been agreed to be delivered on failure of the payment at ſix or twelve months, for then no demand could have been made till that time to entitle the plaintiff to maintain his actions.

Groſe, J.—There is a great difference between a ſale of a ſhip and of other goods. A perſon by being

being in poſſeſſion of a ſhip, does not thereby acquire any credit, becauſe whoever is requeſted to advance money thereon, will require to be ſhewn how the other is owner, and if he has no bill of ſale to produce, his poſſeſſion alone amounts to nothing. Therefore it has been invariably held, that the delivery of the grand bill of ſale is a delivery of the ſhip itſelf. Then are there any falſe colours held out in this caſe? The plaintiff took poſſeſſion of the ſhip, the firſt moment that he could, therefore this conveyance is not within either the ſtatutes of *Elizabeth* or of *James* the firſt, conſequently the plaintiff is entitled to judgment. *Poſtea* to the plaintiff.

THOMPSON *v.* FREEMAN.

2 *Term Rep.* 155.

An action of trover was tried before *Buller* Juſtice at *Guildhall*, which was brought by the aſſignees of the bankrupt in order to recover ſome goods which the defendant had taken poſſeſſion of under a warrant of attorney, to confeſs a judgment executed by the bankrupt about ſix months before the act of bankruptcy committed, but at a time when ſhe knew ſhe was in an inſolvent ſtate.

The defendant had in the year 1780, joined in two bonds with the bankrupt, and had received a counter bond of indemnity; when theſe bonds became due, the bankrupt not having wherewithal to diſcharge them, applied again to the defendant and engaged him to join with her in two new bonds, payable in *July* 1784, for the purpoſe of raiſing money to take up one of the old bonds: one of them was accordingly taken up the 14th of *January* 1784.

The

The defendant took another counter bond of indemnity upon his joining in the two laſt bonds.

Previous to the 3d of *June* 1785, the day on which the act of bankruptcy happened, the bankrupt ſent for the defendant and propoſed to him that he ſhould take out his debt in goods; to which he acceded, and the warrant of attorney in queſtion was given. It appeared that her reaſon for ſending for the defendant originated from a letter, taking notice, though not in a threatening way, of her ſituation with reſpect to the defendant; which letter ſhe had received juſt before from Meſſrs. *Foſſet* and *Bellamy*, whom ſhe knew to have acted in a former tranſaction as attornies for the defendant; though upon this occaſion they were not in fact concerned for him.

The two laſt bonds were not diſcharged by the defendant till ſome time after the execution; nor had the obligees ever threatened to reſort to him for payment at that time; the bonds not having then become due.

Another circumſtance was alſo much relied upon for the plaintiffs at the trial, that the defendant upon his examination before the commiſſioners, had ſworn that when he took poſſeſſion of the goods under the warrant of attorney, he was not an actual creditor.

The Judge left it to the jury to conſider, whether the means which the bankrupt put into the defendant's hands to pay himſelf, were fraudulent or not; for if ſhe had executed the warrant of attorney from neceſſity, or in order to ſave herſelf, though perhaps acting by miſtake, or under a falſe apprehenſion that the defendant was taking due means to enforce his demands upon her, it was certainly a legal act; but if ſhe had acted merely with a view to favour the defendant and give him an undue preference, it was void.

The jury found a verdict for the defendant.

Upon a motion for a new trial, Lord *Mansfield*, Ch. J. ſaid, A bankrupt when in contemplation of his bankruptcy, cannot by his voluntary act favour any one creditor; but if under fear of legal proceſs, he gives a preference, it is evidence that he does not do it voluntarily. And though the defendant in this caſe had taken no ſteps to ſecure himſelf in caſe he was called upon; yet the bankrupt acting from miſtake, was under the ſame apprehenſions of legal proceſs as if the defendant had actually threatened her; ſo that her executing the warrant of attorney was not a voluntary act, but the effect of fear, however groundleſs that might be. And a new trial was refuſed.

ROE *v.* GALLIERS.

2 *Term Rep.* 133.

In ejectment, the caſe was that *John Hunter*, being ſeiſed in fee of the premiſſes in queſtion, demiſed the ſame by two ſeveral leaſes dated the 24th of *December* 1778. to *Green* (who for ſome time before had been, and afterwards continued to be a dealer in horſes) for 21 years from *Michaelmas* 1778, at rack-rents for both farms of 150*l.* a year, without any fine or other conſideration than the yearly rents; in each of which leaſes is contained the following proviſo; "that if the ſaid "yearly rents thereby reſerved, or either of them, "or any part thereof, ſhall be behind or unpaid "for twenty days next after the reſpective days of "payment being lawfully demanded; or if the "ſaid *J. Green*, his executors or adminiſtrators, "ſhall aſſign over the indenture of leaſe, or aſſign "or let the premiſes thereby demiſed, or any part "thereof, to any perſon whatſoever, for any time "or times whatſoever, without the licence or "conſent

"consent of the said *J. Hunter*, his heirs or "assigns, first had or obtained in writing, under "his or their hands for that purpose: or if the "said *J. Green*, his executors or administrators, "shall commit any act of bankruptcy within the "intent and meaning of any statutes made or to "be made in relation to bankrupts, whereon a "commission shall issue, and he or they shall be "found and declared to be a bankrupt or bankrupts: "or if he or they shall make any composition with "his or their creditors for the payment of his or "their debts, though a commission of bankrupt "doth not issue: or if he or they shall make any "assignment of his or their effects, in trust for "the benefit of his or their creditors; that then "and from thenceforth, in any of the said cases, "it shall and may be lawful to and for the said "*J. Hunter*, his heirs and assigns, into the "said demised premises, to re-enter; and the "same again to have, re-possess and enjoy, as in "his or their former estate; any thing therein "contained to the contrary notwithstanding." Counterparts of the said leases were executed. The farms after such demise, and before the bankruptcy of *Green*, were improved by the bankrupt 30*l. per annum*. A commission issued on the 3d of *February* 1787, against *Green*, and he was duly found and declared a bankrupt; the defendants afterwards entered into the premises, and were possessed as assignees under the commission, and the usual assignment. Upon a question, whether the proviso in the lease was good?

Ashhurst, J. said, The only question is, Whether a proviso in a lease that if the lessee commit an act of bankruptcy, or in other words, do any of those acts upon which a commission of bankrupt may be sued out, the landlord shall have a right to re-enter is legal, or not? The general principle is clear, that the landlord having the *jus disponendi*,

may annex whatever conditions he pleaſes to his grant, provided they be not illegal or unreaſonable. Then is this proviſo, contrary to any expreſs law, or ſo unreaſonable, as that the law will pronounce it to be void? That it is not againſt any poſitive law is admitted, no caſe has decided it to be illegal. In the caſe of Lord *Stanhope* againſt *Skeggs*, the court were divided in opinion upon the queſtion which aroſe there; therefore that is no authority either way; but conſidering what the ground of that difference was, it is ſome authority in ſupport of this proviſo; for the doubt aroſe upon conſidering whether a clauſe of reſtraint could operate upon the executors to prevent them from aſſigning land which was expreſsly leaſed to the original tenant and his executors, *eo nomine*; when that was the only means by which they could exerciſe their truſt. Now that doubt does not occur in this caſe, this queſtion turning on a different point. This proviſo then not being againſt any expreſs authority of law, it remains to be conſidered, whether it is void or unlawful as againſt reaſon or public policy; now it does not appear to me to be againſt either. Firſt, it is reaſonable that a landlord ſhould exerciſe his judgment with reſpect to the perſon to whom he truſts the management of his eſtate; a covenant therefore not to aſſign is legal. Covenants to that effect are frequently inſerted in leaſes, and ejectments are every day brought on a breach of ſuch covenants. The landlord may very well provide, that the tenant ſhall not make him liable to any riſk by a voluntary aſſignment, or by any act which obliges him to relinquiſh the poſſeſſion. If it be reaſonable for him to reſtrain the tenant from aſſigning, it is equally reaſonable for him to guard againſt ſuch an event as the preſent, becauſe the conſequence of the bankruptcy is an aſſignment of the property into other hands. Perhaps it may be more neceſ-

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ſary for the landlord to guard againſt this latter event, as there is greater danger to be apprehended by him in this than in the former caſe. Perſons who are put into poſſeſſion under a commiſſion are ſtill leſs likely to take proper care of the land than a private aſſignee of the firſt tenant. Neither is there any reaſon of public policy to be urged againſt allowing ſuch a proviſo. It conduces to the ſecurity of the landlords, which can never be urged as a ground of objection on that head. On the whole therefore I am of opinion, that this is a valid proviſo, and the leaſe having been forfeited by the tenant's becoming a bankrupt, the leſſor of the plaintiff is entitled to recover.

Buller, J.—After commending the conciſeneſs of the ſpecial verdict, and recommending it as an example in future, ſaid, the queſtion lies in a very narrow compaſs. Whether a proviſo in a leaſe for twenty-one years, that it ſhall be void if the leſſee become a bankrupt, is good in law? The defendant's counſel has commented much upon the different parts of this proviſo. I cannot ſay whether any part of it may or may not be objectionable with reference to the ſtatutes concerning bankrupts, we are now to decide upon the conſtruction of a proviſo at common law, and not on any ſtatute. There is a great difference between them. Lord Chief Juſtice *Wilmot*, took the diſtinction in a caſe before him in the *Common Pleas*, in which his Lordſhip ſaid, where the queſtion depends on a ſtatute, that mows down all before it, and it acts like a powerful tyrant that knows no bounds, but the common law acts with a more lenient hand, it roots out that which is bad and leaves that which is good. The queſtion here is, whether this proviſo is good according to the principles of the common law, as to that part of it on which this queſtion ariſes, namely the act of bankruptcy, which is the only point neceſſary to be conſidered. The

caſes cited by the defendant's counſel, have not the leaſt analogy to the preſent queſtion. That which was cited from *Equity Caſes Abridged*, proves nothing to this purpoſe. It was there taken for granted, that a clauſe to prevent alienation by the tenant was good, but the Court conſidered, that the particular alienation in queſtion was not within the terms of the covenant, becauſe the covenant only extended to the act of the party, and that was an alienation in law, for that aſſignment was by virtue of a ſtatute. This caſe has alſo been argued on general principles of inconvenience, becauſe the poſſeſſion of an eſtate on ſuch terms enables tenants to hold out falſe colours to the world. But that ſort of obſervation does not apply to the caſe of land, for a creditor would not rely on the bare poſſeſſion of the land by the occupier, unleſs he knew what intereſt he had in it. If he were deſirous of knowing that he muſt look into the leaſe itſelf, and there he would find the proviſo, that the tenant's intereſt would be forfeited in caſe of his bankruptcy. The ſtock upon a farm may indeed induce a credit, but that will not govern the preſent caſe. It is next urged that this is equivalent to a proviſo, that the leaſe ſhall not be ſeized under a commiſſion of bankruptcy, the defendant's counſel, having firſt ſuppoſed the leaſe to be granted abſolutely for a certain term, and then that a ſubſequent proviſo is added to that effect. Such a proviſo as that indeed would be bad, becauſe it would be repugnant to the grant itſelf; but here there is an expreſs limitation that the leaſe ſhall be void upon the fact of the leſſee's becoming a bankrupt. It is clear that the landlord in this caſe parted with the term on account of his perſonal confidence in his tenant, that is manifeſtly the caſe in all leaſes where clauſes againſt alienation are inſerted. The landlord perhaps relies on the tenant's honeſty, or he approves of his

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ſkill in farming, and thinks he will take more care of the farm than another, and therefore he has a right to guard againſt the event of the eſtate's falling into the hands of any other perſon who may not manage it ſo well as the original tenant. Suppoſe a leaſe were made for twenty-one years, on condition that the tenant ſhall ſo long continue to occupy the land perſonally, there could be no objection made to ſuch a condition, for the perſonal confidence is the very motive of granting the leaſe, and that is like the preſent caſe. Lord *Stanhope*'s caſe does not apply at all to this. In the firſt place the Court were equally divided, and therefore the caſe is of no authority. In mentioning this I do not mean to ſay or even to inſinuate, that the opinion which I then held was right. But there is a great difference between the two caſes, for there the leaſe was granted to the tenant, his executors and adminiſtrators, they were to take as ſuch, which gave riſe to the doubt in that caſe, and Lord *Mansfield* there ſaid the difficulty is, that as by the terms of the leaſe, the executors were to take, the ſubſequent proviſo, that they ſhould not aſſign ſeems to be repugnant to the grant itſelf. Again, that was not a huſbandry leaſe for twenty-one years like the preſent, but for forty-one years, and there may be great reaſon for a diſtinction between the two terms, for if ſuch a proviſo as this were inſerted in very long leaſes, it would be tying up property for a conſiderable length of time, and would be open to the objection of creating a perpetuity. But the principal ground is, that this is a ſtipulation not againſt law, not repugnant to any thing ſtated in the former part of the leaſe, but merely a ſtipulation againſt the act of the leſſee himſelf, which I think it was competent for the leſſor to make.

Groſe, J.—The queſtion is, whether the landlord may not ſtipulate, that he will let his land

only to the tenant, or to such assignees of the tenant as the landlord shall approve of. I know of no statute or case which says that such a stipulation is bad. The defendant's counsel has called to his assistance the 21 *Jac.* 1. but that has never been construed to extend to lands, it only relates to goods and chattels. The argument of the tenant's obtaining credit by holding out false colours does not apply to the case of land, but merely to goods, for a man does not get credit merely from the occupation of land, but from the interest which he has in it; in order to know which, it is necessary that the creditor should see the lease, which when produced, would shew that the estate would be defeated upon the tenant's becoming a bankrupt. Therefore the argument derived from the credit, which the tenant is likely to get by being in possession of the land can have no weight in this case. As to the inconvenience which has been contended will arise from establishing the validity of this proviso, it rather bears the other way, for this cannot be determined to be illegal on any principle, which would not equally extend to leases which are every day granted in large towns, restraining the assignment of houses to persons exercising obnoxious trades, that not only diminishes the value of the particular house so assigned, but also the adjoining houses belonging probably to the same landlord. Judgment for the plaintiff.

D'AQUILA *v.* LAMBERT.

In Chancery, 9th June 1761.

The plaintiff being a merchant at *Leghorn*, bought a large quantity of goods by direction of the defendant *Israeli* who resided in *England*, and consigned them to him, and drew bills of exchange

change for the money. The bills were accepted by *Iſraeli*, but were proteſted for non-payment on *Iſraeli*'s becoming inſolvent, and making a compoſition with his creditors and aſſigning his effects in truſt for them.

The goods arrived at the port of *London*, and the agent for the conſignor, and the agent for the creditors ſeverally applied to the captain for the goods but he refuſed to deliver them till the right was ſettled.

Upon a bill filed by the plaintiff to have the goods delivered.

It was argued for the plaintiff, that the conſignor may ſtop the goods, at any time before they get into the hands of the conſignee, in caſe the conſignee is in ſuch circumſtances as not to be able to pay for them, and ſeveral caſes were cited; *Wiſeman* and *Vandeput*, 2 *Vern.* 203. and *Ex parte Wilkinſon*, in *Chancery*, 21ſt *March* 1755. Which was thus: Wines conſigned from *Liſbon* to a merchant in *London*, the wines were brought before they got into the hands of the conſignee, to *Lynn*, and the conſignee becoming bankrupt, the agent for the conſignor ſtopt the wines there, and it was held he might do ſo at any time, and that caſe was ſaid to differ from *Wiſeman* and *Vandeput*, as the conſignee run a greater riſque by reaſon of the voyage; but Lord *Hardwicke* ſaid, as there was no poſſeſſion in the bankrupt, no appearance of credit upon the goods, nor any payment made, the agent had a right to ſtop them.

On the other ſide it was argued, that the legal right was clearly in the conſignee, that the delivery and poſſeſſion were material circumſtances in all caſes of this kind. That the goods having been delivered to the captain, he was bound in point of law to anſwer them to the conſignee. If they were loſt in the voyage it was the loſs of the conſignee, and the caſe of *Evans* and *Martlet* in 1

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Lord *Raymond*, was cited for that purpoſe. That whatever determination the court has made in particular circumſtances, it has never declared on a general caſe, that the conſignee has a right to ſtop the goods at the delivering port, and in a caſe where there was no commiſſion of bankruptcy, but only a truſt deed for creditors. That the preſent caſe, differed from *Wiſeman* and *Vandeput*, in reſpect that the goods were ſtopt in that caſe before the voyage began. And that there were no equitable circumſtances to induce the court to act againſt the legal right.

Lord *Henley*.—This is a queſtion of extent and conſequence in trade. If it had been *res integra*, I ſhould have required a more extenſive argument and taken time to conſider, but it is not a caſe of difficulty, and has been ſettled by ſeveral determinations, which have been univerſally approved by merchants. The caſe of *Wilkinſon* is in point. It was determined on ſolid reaſons; that the goods of one man ſhould not be applied in payment of another man's debts. And he decreed the goods to be delivered to the plaintiff.

Ex parte CLARE,

Before LORD KING, 31*ſt. July*, 1729.

Hammond and *Smyther* two merchants of *London*, gave bills of credit to *Clare*, who covenanted to ſail from *London* to *Liſbon*, and there take in ſalt, from thence to proceed to *Newfoundland*, and ſtow with cod-fiſh which he was to deliver at ſome port up the *Streights*, and load home with fruit. *Clare* performed the contract on his part and delivered the goods, but having drawn bills on *Smyther* and *Hammond*, which on *Smyther* becoming bankrupt were proteſted; *Clare* petitioned to have a moiety

a moiety of the fruit delivered at home, and a moiety of the fish delivered at *Alicant*, sold and applied towards payment of the bills of exchange. And the same were ordered to be sold accordingly, and if they were not sufficient, *Clare* was to be admitted a creditor under the commission for the residue.

WINCH *v.* KEELEY.

1 *Term Rep.* 619.

The plaintiff assigned over a debt of 73 *l.* 12 *s.* 9 *d.* due to him from the defendant, to one *Joseph Searles* as a security for a debt of 74 *l.* owing from the plaintiff to the said *Joseph Searles*. Before the action brought, the plaintiff became bankrupt, and the defendant pleaded the bankruptcy; in the replication the facts above stated were set forth. The defendant demurred to the replication, which brought the question, whether this debt passed by the commissioners assignment, before the Court.

Ashhurst, J.—The cases that have been cited by the plaintiff's counsel go a great way in determining this question, it is true that formerly the courts of law did not take notice of an equity or a trust, for trusts are within the original jurisdiction of a court of equity. But of late years as it has been found productive of great expence to send the parties to the other side of the hall, wherever this Court have seen that the justice of the case has been clearly with the plaintiff, they have not turned him round upon this objection. Then if this Court will take notice of a trust, why should they not of an equity; it is certainly true that a *chose in action*,

Unwin v. Oliver. 1 Burr. 481. Ex parte Byles. 1 Atk. 124. Bottomly v. Brook. M. 22 G. 3. C. B. Webster v. Scales. M. 25. G. 3. B. R.

action, cannot ſtrictly be aſſigned, but this Court will take notice of a truſt, and conſider who is beneficially intereſted, as in *Bottomley* v. *Brook*, where the Court ſuffered the defendant to ſet off a debt due from Mrs. *Chancellor*, in the ſame manner as if the action had been brought by her; the only difference between that caſe and this is, that the plaintiff himſelf was not originally intereſted in the debt, but this plaintiff was; but that does not make any eſſential difference, becauſe if it be once eſtabliſhed that this Court will take notice of truſts, it is immaterial whether the perſon who ſues were originally truſtee or afterwards becomes ſo, nor is it material at what time he became a truſtee, for whether he became ſuch by the aſſignment, or was ſo originally, it is ſufficient to ſay that he is a truſtee now, and as ſuch has a right to maintain this action. If this had been a fraudulent aſſignment it would have raiſed a different queſtion, but on theſe pleadings it muſt be taken to have been aſſigned for a valuable conſideration. The caſe of *Webſter* and *Scales* is in point, and on the authority of that and the other caſes cited, I am of opinion that the plaintiff may recover.

Buller, J.—This action is brought in the name of the aſſignor of this bond, and therefore it does not involve in it the queſtion, whether a *choſe in action* may be ſo aſſigned as to give a legal title to the aſſignee. The plea only ſays, that the plaintiff is become a bankrupt, and that this debt is transferred to his aſſignees; the anſwer to that is, that this debt is due in form to the plaintiff, but in ſubſtance to a third perſon, and therefore it is not ſuch a debt as paſſed under the commiſſion, if not, it is ſtill in the plaintiff, and he is entitled to maintain this action. The ſtatute of 1 *Jac.* 1. *c.* 15. only ſays, that ſuch debts are to be aſſigned as are for the benefit of the bankrupt. This conſtruction

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tion was put upon the ſtatute ſoon after it paſſed, in a caſe in *March* 38. where it was held that ſuch things as the bankrupt held as truſtee did not paſs under the commiſſion, here it muſt be taken on theſe pleadings, that this did not paſs under the commiſſion, therefore it remained in the bankrupt, and he may maintain this action. Judgment for the plaintiff.

Ex Parte WALKER *and* WOODBRIDGE.

After Trin. Term. 1755.

William Gaynor, of *Briſtol*, by letter ordered the petitioners his correſpondents in the iſland of *Barbadoes*, to buy him 10 hogſheads of *Barbadoes* ſugar, which they accordingly did, for and on account of *Gaynor*, and ſhipped them on board *The William*, bound from *Barbadoes* to *Briſtol*, and drew a bill on *Gaynor* for 94*l.* 15*s.* 6½*d.* being part of the amount of the ſugar, and the balance of accounts between them. *Gaynor* did not accept the bill, but ſuffered it to be noted and proteſted; and *Gaynor* becoming bankrupt, *Woodbridge* on the arrival of the ſhip at *Briſtol*, entered the 10 hogſheads of ſugar at the cuſtom-houſe there, in order to pay the cuſtoms for it, but on landing the ſugars, one of the bankrupt's aſſignees with two other perſons forcibly took poſſeſſion of the ſugar. Upon petition to have the ſugar delivered to *Woodbridge* and *Walker*, it was ordered that the aſſignees ſhould pay the petitioners 95*l.* 14*s* 6½*d.* together with the coſts of noting and proteſting the bill of exchange, and in default it was ordered, that the ſame be paid by ſale of the ſugars.

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LICKBARROW *againſt* MASON *and others.*

2 Term Rep. 63.

In an action of trover for a cargo of corn; *Plea* the general iſſue, the plaintiffs at the trial before *Buller*, J. at the *Guildhall* Sittings, gave in evidence that *Turing* and Son, merchants at *Middleburgh*, in the province of *Zealand*, on the 22d of *July*, 1786, ſhipped the goods in queſtion on board *The Endeavour* for *Liverpool*, by the order and directions and on the account of *Freeman* of *Rotterdam*. That *Holmes* as maſter of the ſhip ſigned four ſeveral bills of lading for the goods, in the uſual form unto order or to aſſigns; two of which were endorſed by *Turing* and Son, in blank, and ſent on the 22d of *July*, 1786, by them to *Freeman*, together with an invoice of the goods, who afterwards received them. Another of the bills of lading was retained by *Turing* and Son, and the remaining one was kept by *Holmes*. On the 25th of *July*, 1786, *Turing* and Son, drew four bills of exchange upon *Freeman*, amounting in the whole to 477 *l.* in reſpect of the price of the goods, which were afterwards accepted by *Freeman*. On the 25th of *July*, 1786, *Freeman* ſent to the plaintiffs the two bills of lading, together with the invoice which he had received from *Turing* and Son, in the ſame ſtate in which he received them, in order that the goods might be taken poſſeſſion of and ſold by them on *Freeman*'s account: and on the ſame day *Freeman* drew three ſets of bills of exchange, to the amount of 520 *l.* on the plaintiffs who accepted them, and have ſince duly paid them. The plaintiffs were creditors of *Freeman*, to the amount of

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542 *l.* On the 15th of *Auguſt*, 1786, and before the bills of exchange drawn by *Turing* and Son, on *Freeman* became due, *Freeman* became a bankrupt, thoſe bills were regularly proteſted, and *Turing* and Son, have ſince been obliged as drawers to take them up and pay them. The price of the goods ſo ſhipped by *Turing* and Son is wholly unpaid; *Turing* and Son hearing of *Freeman*'s bankruptcy, on the 21ſt of *Auguſt*, 1786, endorſed the bill of lading ſo retained by them to the defendants, and tranſmitted it to them with an invoice of the goods, authoriſing them to obtain poſſeſſion of the goods on account of and for the uſe and benefit of *Turing* and Son, which the defendant received on the 28th *Auguſt*, 1786. On the arrival of the veſſel with the goods at *Liverpool*, on the 28th of *Auguſt*, 1786, the defendants applied to *Holmes* for the goods, producing the bill of lading, who thereupon delivered them, and the defendants took poſſeſſion of them for and on account of and to and for the uſe and benefit of *Turing* and Son. The defendants ſold the goods on the account of *Turing* and Son, the proceeds whereof amounted to 557 *l.* Before the bringing of this action, the plaintiffs demanded the goods of the defendants, and tendered to them the freight and charges, but neither the plaintiffs or *Freeman*, have paid or offered to pay the defendants for the goods. To this evidence the defendants demurred and the plaintiff joined in demurrer.

Aſhhurſt, J.—As this was a mere mercantile queſtion of very great importance to the public, and had never received a ſolemn deciſion in a court of law, we were for that reaſon deſirous of having the matter argued a ſecond time, rather than on account of any great doubts which we entertained on the firſt argument; we may lay it down as a broad general principle, that wherever one of two innocent perſons muſt ſuffer by the acts of a third,

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he who has enabled ſuch third perſon to occaſion the loſs muſt ſuſtain it. If that be ſo, it will be a ſtrong and leading clue to the deciſion of the preſent caſe. It has been argued, that it would be very hard on a conſignor, who had received no conſideration for his goods, if he ſhould be obliged to deliver them up in caſe of the inſolvency of the conſignee, and come in as a creditor under his commiſſion for what he can get. That is certainly true, but it is a hardſhip which he brings upon himſelf; when a man ſells goods, he ſells them on the credit of the buyer: if he delivered the goods the property is altered, and he cannot recover them back again, though the vendee immediately became a bankrupt. But where the delivery is to be at a diſtant place, as between the vendor and the vendee, the contract is ambulatory till delivery, and therefore in caſe of the inſolvency of the vendee in the mean time, the vendor may ſtop the goods *in tranſitu*. But as between the vendor and third perſons the delivery of a bill of lading, is a delivery of the goods themſelves, if not it would enable the conſignee to make the bill of lading an inſtrument of fraud. The aſſignee of a bill of lading truſts to the endorſement, the inſtrument is in its nature transferable; in this reſpect, therefore this is ſimilar to the caſe of a bill of exchange. If the conſignor had intended to reſtrain the negotiability of it, he ſhould have confined the delivery of the goods to the vendee only, but he has made it an endorſable inſtrument. So it is like a bill of exchange, in which caſe, as between the drawer and the payee, the conſideration may be gone into, yet it cannot between the drawer and an endorſee, and the reaſon is, becauſe it would be enabling either of the original parties to aſſiſt in a fraud, This rule is founded purely on principles of law, and not on the cuſtom of merchants; the cuſtom of merchants only eſtabliſhes, that ſuch an inſtrument may be endorſed,

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but the effect of that endorſement is a queſtion of law which is, that as between the original parties, the conſideration may be inquired into, though when third perſons are concerned it cannot. This is alſo the caſe with reſpect to a bill of lading, though the bill of lading in this caſe was at firſt endorſed in blank, it is preciſely the ſame, as if it had been originally endorſed to this perſon, for when it was filled up with his name, it was the ſame as if made to him only. Then what was ſaid by Lord *Mansfield*, in the caſe of *Wright* and *Campbell*, goes the full length of this doctrine, if the goods be *bonâ fide* ſold by the factor at ſea, (as they may be where no other delivery can be given) it will be good notwithſtanding the ſtatute 21 *Jac.* 1. *c.* 19. and the vendee ſhall hold them by virtue of the bill of ſale, though no actual poſſeſſion is delivered, and the owner can never diſpute with the vendee, becauſe the goods were ſold *bonâ fide*, and by the owner's own authority. Now in this caſe the goods were transferred by the authoriry of the vendor, becauſe the vendee had a power to transfer them, and being ſold by his authority the property is altered, and I am of opinion, that this right of the aſſignee, could not be diveſted by any ſubſequent circumſtances.

Buller, J.—This cauſe has been very fully, elaborately, and very ably argued, both now and in the laſt term, and though the former arguments on the part of the defendant, did not convince my mind, yet they ſtaggered me ſo much, that I wiſhed to hear a ſecond argument. Before I conſider the effect of the ſeveral authorities which have been cited, I will take notice of one circumſtance, which is peculiar to it, not for the purpoſe of founding my judgment upon it, but becauſe I would not have it ſuppoſed, in any future caſe, that it paſſed unnoticed; or that it may not hereafter have any effect, which it ought to have. In this caſe, it is ſtated that there were four bills of lading: it

appears by the books treating on this ſubject, that according to the common courſe of merchants there are only three, one of which is delivered to the captain of the veſſel, another is tranſmitted to the conſignee, and the third is retained by the conſignor himſelf as a teſtimony againſt the captain in caſe of any looſe dealing. Now if it be at preſent the eſtabliſhed courſe, among merchants, to have only three bills of lading, the circumſtance of there being a fourth in this caſe, might, if the caſe had not been taken out of the hands of the jury by the demurrer, have been proper for their conſideration. I am aware that that circumſtance appears in the bill on which it is written, the maſter hath affirmed to four bills of lading all of this tenor and date. But we all know that it is not the practice, either of perſons in trade, or in the profeſſion, to examine very minutely the words of an inſtrument which is partly printed and partly written; if we only look at the ſubſtance of ſuch an inſtrument, this may be the means of enabling the conſignee to commit a fraud on an innocent perſon. Then how ſtood the conſignee in this caſe? he had two of the bills of lading, and the captain muſt have a third, ſo that the aſſignee could not imagine that the conſignor had it in his power to order a delivery to any other perſon. But I mean to lay this circumſtance entirely out of my conſideration in the preſent caſe, which I think turns wholly on the general queſtion, and I make the queſtion even more general than was made at the bar, namely, Whether a bill of lading is by law a tranſfer of the property? This queſtion has been argued upon authorities; and before I take notice of any particular objections which have been made, I will conſider thoſe authorities. The principal one relied on by the defendants, is that of *Snee* and *Preſcot*; now, ſitting in a court of law, I ſhould think it quite ſufficient to ſay that that

was a determination in a court of equity, and founded on equitable principles. The leading maxim in that court is, that he who ſeeks equity muſt firſt do equity. I am not diſpoſed to find fault with that determination as a caſe in equity; but it is not ſufficient to decide ſuch a queſtion as that now before us. Lord *Hardwicke* has, with his uſual caution, enumerated every circumſtance which exiſted in the caſe, and indeed he has been ſo particular, that if the printed note of it be accurate, which I doubt, it is not an authority for any caſe which is not preciſely ſimilar to it; the only point of law in that caſe is upon the forms of the bills of lading; and Lord *Hardwicke* thought there was a diſtinction between bills of lading endorſed in blank, and thoſe endorſed to particular perſons: but it was properly admitted at the bar that that diſtinction cannot now be ſupported. Thus the matter ſtood till within theſe thirty years; ſince that time the commercial law of this country has taken a very different turn from what it did before. We find in *Snee* and *Preſcot*, that Lord *Hardwicke* himſelf was proceeding with great caution, not eſtabliſhing any general principle; but decreeing on all the circumſtances of the caſe put together. Before that period we find that in courts of law all the evidence in mercantile caſes was thrown together; they were left generally to a jury, and they produced no eſtabliſhed principle. From that time we all know the great ſtudy has been to find ſome certain general principle, which ſhall be known to all mankind, not only to rule the particular caſe then under conſideration, but to ſerve as a guide for the future. Moſt of us have heard theſe principles ſtated, reaſoned upon, enlarged, and explained, till we have been loſt in admiration at the ſtrength and ſtretch of the human underſtanding, and I ſhould be very ſorry to find myſelf under a neceſſity of differing

from any caſe on this ſubject, which has been decided by Lord *Mansfield*, who may be truly ſaid to be the founder of the commercial law of this country. I hope to ſhew, before I have finiſhed my judgment, that there has been no inconſiſtency in any of his determinations; but if there had, if I could not reconcile an opinion which he had delivered at *niſi prius* with his judgment in this court, I ſhould not heſitate to adopt the latter in preference to the former; and it is but juſt to ſay, that no Judge ever ſat here more ready than he was to correct an opinion ſuddenly given at *niſi prius*. Firſt, as to the caſe of *Wright* and *Campbell*, that was a very ſolemn opinion delivered in this court. In my opinion that is one of the beſt caſes that we have in the law on mercantile ſubjects. There are four points in that caſe which Lord *Mansfield* has ſtated ſo extremely clear, that they cannot be miſtaken. The firſt is, what is the caſe as between the owner of the goods and the factor; the ſecond, as between the conſignor and the aſſignee of the factor with notice; thirdly as between the ſame parties without notice; and fourthly, as to the nature of a bill of ſale of goods at ſea in general. It is to be recollected that the caſe of *Wright* and *Campbell* was decided by the judge at *niſi prius*, upon the ground that the bill of lading transferred the whole property at law, and when it came before this court on a motion for a new trial, Lord *Mansfield* confirmed that opinion; but a new trial was granted on a ſuſpicion of fraud: therefore it is fair to infer that if there had been no fraud, the delivery of the bill of lading would have been final. If there be fraud, it is the ſame as if the queſtion were tried between the conſignor and the original conſignees; according to a note of *Wright* and *Campbell*, which I took in court, Lord *Mansfield* ſaid, that ſince the caſe in Lord *Raymond* it had always been held

held that the delivering of a bill of lading transferred the property at law: if ſo, every exception to that rule ariſes from equitable conſiderations which have been adopted in courts of law. The next caſe is that of *Savignac* and *Cuff*, the note of which is too looſe to be depended upon; but there is a circumſtance in that caſe, which might afford ample ground for the deciſion, for I cannot ſuppoſe that Lord *Mansfield* had forgotten the doctrine which he laid down in this court in *Wright* and *Campbell*. There he obſerved very minutely on what did not appear at the trial, that no letters were produced, and that no price was fixed for the goods; but in *Savignac* and *Cuff* the plaintiff had not only the bills of lading and the invoice, but he had alſo the letters of advice from which the real tranſaction muſt have appeared; and if it appeared to him that *Selvetti* had not been paid for the goods, that might have been a ground for the determination. The caſe of *Hunter* and *Beal* does not come up to the point now in diſpute, it only determines what is admitted, that, as between the vendor and vendee, the property is not altered till delivery of the goods. With reſpect to the caſe of *Stokes* and *La Riviere*, perhaps there may be ſome doubt about the facts of it; however, it was determined upon a different ground; for the goods were in the hands of an agent for both parties; that caſe therefore does not impeach the doctrine laid down in *Wright* and *Campbell*. It has been argued at the bar, that it is impoſſible for the holder of a bill of lading to bring an action on it, againſt the conſignor; perhaps that argument is well founded; no ſpecial action on the bill of lading has ever been brought, for if the bill of lading transfer the property, an action of trover againſt the captain for non-delivery, or againſt any other perſon who ſeizes the goods, is the proper form of action. If an action

is brought by a vendor againſt a vendee, between whom a bill of lading has paſſed, the proper action is for goods ſold and delivered. Then it has been ſaid that no caſe has yet decided that a bill of lading does transfer the property; but in anſwer to that, it is to be obſerved, that all the caſes upon the ſubject, *Evans* v. *Martlett*, *Wright* v. *Campbell*, and *Caldwell* v. *Ball*, and the univerſal underſtanding of mankind, preclude that queſtion.

The caſes between the conſignor and conſignee have been founded on principles of equity, and have followed up the principle of *Snee* and *Preſcot*; for if a man has bought goods, and has not paid for them, and cannot pay for them, it is not equitable that he ſhould prevent the conſignor from getting his goods back again, if he can do it before they are in fact delivered. There is no weight in the argument of hardſhip on the vendor; at any rate that is a bad argument in a court of law; but in fact there is no hardſhip on him, becauſe he has parted with the legal title to the conſignee. An argument was uſed with reſpect to the difficulty of determining at what time a bill of lading ſhall be ſaid to transfer the property, eſpecially in a caſe where the goods were never ſent out of the merchant's warehouſe at all; the anſwer is, that under thoſe circumſtances a bill of lading could not poſſibly exiſt, if the tranſaction were a fair one; for a bill of lading is an acknowledgment by the captain of having received the goods on board his ſhip; therefore it would be a fraud in the captain to ſign ſuch a bill of lading, if he had not received goods on board, and the conſignee would be entitled to his action againſt the captain for the fraud. As the plaintiff in this caſe has paid a valuable conſideration for the goods, and there is no colour for imputing fraud

fraud or notice to him, I am of opinion that he is entitled to the judgment of the court.

Groſe, J.—After this caſe has been ſo elaborately ſpoken to by my brethren, it is not neceſſary for me to enter fully into the queſtion, as I am of the ſame opinion with them. But I think that the importance of the ſubject requires me to ſtate the general grounds of my opinion. I conceive this to be a mere queſtion of law, whether as between the vendor and the aſſignee of the vendee, the bill of lading transfers the property? I think that it does. With reſpect to the queſtion, as between the original conſignor and conſignee, it is now the clear, known and eſtabliſhed law, that the conſignor may ſeize the goods *in tranſitu*, if the conſignee become inſolvent before the delivery of them. But that was not always the law; the firſt caſe of that ſort was that of *Wiſeman*, and *Vandeput* in Chancery, when on the firſt hearing, the Chancellor ordered an action of trover to be brought, to try whether the conſignment veſted the property in the conſignees, and it was then determined in a court of law that it did, but the court of equity thought it right to interpoſe and give relief, and ſince that time it has always been conſidered, as between the original parties, that the conſignor may ſeize the goods, before they are actually delivered to the conſignee, in caſe of the inſolvency of the conſignee. But this is a queſtion between the conſignor and the aſſignee of the conſignee who does not ſtand in the ſame ſituation as the original parties. A bill of lading carries credit with it: the conſignor by his endorſement, gives credit to the bill of lading, and on the faith of that money is advanced. The firſt caſe that I find, where an attempt was made to introduce the ſame law, between the conſignor and the indorſee of the conſignee, is that of *Snee* and *Preſcot*, but as my brother *Buller* has already made ſo many obſer-

vations on that caſe, it would but be repetition in me to go over them again, as I entirely agree with him in them in all, as well as in thoſe which he made on the other caſes. Therefore I am of opinion, that there ſhould be judgment for the plaintiff.

SOLOMONS *v.* NISSEN.

2 *Term Rep.* 674.

Trover for 785 pigs of lead, tried before *Buller* Juſtice, and a verdict for the plaintiff for 1006 *l.* ſubject to the opinion of this court on the following caſe.

Edward Hague bought the 785 pigs of lead of the defendants in *Liverpool* on the 21ſt of *March* 1787, and ordered them to be ſhipped to *Rouen* in *France*. The lead was of the value of 1000 *l.* The ſaid lead was accordingly ſhipped on the 10th of *March* 1787, by the defendant, at *Cheſter* on board the *Jane*, and the bill of lading was endorſed by the defendants in blank, and ſent to *Edward Hague*. The plaintiff on the 16th of *March* 1787 gave *Hague* his acceptances for 700 *l.* as ſtated in the following note, upon which *Hague* delivered the bill of lading to the plaintiffs. *London* the 16th of *March* 1787. "Whereas *Jonas Solomons* "has this day accepted for us the ſum of 700 *l.* "at two months, on account of a cargo of lead "ſent to *Rouen*, we hereby promiſe in caſe "the ſaid lead is not remitted for, by the time "theſe bills fall due, they ſhall be renewed for "two months longer, *Charles* and *Edward Hague*." The acceptances were paid by the plaintiff when due, to the endorſees of theſe acceptances. On the 21ſt of *March* 1787, the following agreement was made between *Edward Hague* (who traded

traded under the firm of *Charles* and *Edward Hague)* and the plaintiffs. "Be it known that "it is this day agreed between *Edward Hague*, "&c. trading under the firm of *Charles* and *Ed-* "*ward Hague*, of the one part and *Jonas Solomons* "of the other part, as follows. That the ſaid *Jonas* "*Solomons* ſhould pay for, and ſend in his name to "Meſſrs. *Robert Garvey* and *Co.* merchants at "*Rouen*, a cargo conſiſting of 785 pigs of lead, "to be ſhipped at *Cheſter*, on board the *Jane*, "bound to *Rouen*, to be ſold by Meſſrs. *Garvey* "and *Co.* at the beſt price and prices that can be "obtained for the ſame, and the nett proceeds to "be remitted to the ſaid *Jonas Solomons*. And "it is hereby agreed between the ſaid parties that "the profit and loſs ariſing from the ſaid cargo of "lead ſhall be equally divided between the ſaid "*Edward Hague* and *Jonas Solomons*. And the "ſaid *Edward* doth hereby promiſe and agree to "and with the ſaid *Jonas Solomons*, that in caſe "the ſaid cargo of lead is ſold at *Rouen* by the ſaid "*Robert Garvey* and *Co.* upon credit, that then, "and in ſuch caſe, the ſaid *Robert Garvey*, and "*Co.* ſhall ſtand *del credere* for the purchaſers, "and that he the ſaid *Edward Hague* ſhall and "will ſtand guarantee to the ſaid *Jonas Solomons* "for the ſolidity of the ſaid houſe of trade of *Robert* "*Garvey* and *Co.* for the due payment by them, of "the proceeds of the ſaid cargo of lead. And "laſtly it is agreed that the ſaid cargo of lead "ſhall be inſured by the ſaid *Edward Hague*, or "by the ſaid *Jonas Solomons*, to the amount of "1100*l.* and that the policy of inſurance ſhall "be and remain in the hands and poſſeſſion of "the ſaid *Jonas Solomons* for him to recover and "receive ſuch loſs and loſſes as may ariſe upon "the ſaid cargo of lead, and ſhould be recover- "able from the underwriters of ſuch policy and "that he the ſaid *Jonas Solomons* ſhall and will

"account

"account with the ſaid *Edward Hague* for the "monies ſo recovered upon the policy in caſe of "the loſs aforeſaid." The veſſel ſailed with the lead for *Rouen* in *March* 1787, but was forced back by ſtreſs of weather to *Cheſter*, and *Edward Hague* having become a bankrupt, and the defendant not having been paid the price of the ſaid goods, the defendant on that account on or about the 5th of *April* ſtopped the ſaid goods while they were on board the ſhip in *England*, and took them away. The goods were never paid for by *Hague*, or any other perſon. On the 25th of *May*, *Jonas Solomons* demanded the 785 pigs of lead of the defendants, who refuſed to deliver them, and converted them to their own uſe.

Lord *Kenyon*, Ch. J.—This appears to be a harſh demand againſt theſe defendants, who it is confeſſed have not received the value of the goods in queſtion. The firſt caſe on this ſubject is that of *Snee* and *Preſcot*, before Lord *Hardwicke*, who was of opinion, that where a merchant has ſold goods which have not in fact been delivered nor paid for, he may while they are *in tranſitu*, obtain the poſſeſſion of them again by any means ſhort of abſolute violence. But the caſe of *Lickbarrow* and *Maſon*, has in my mind, very properly narrowed the extent of that doctrine; that caſe was decided on principles of policy and common honeſty. It was there ſaid, that if the goods come into the hands of a third perſon for a valuable conſideration *bonâ fide*, and without notice, he ſhall not be prejudiced becauſe the conſignor was ſo incautious as to truſt the goods out of his poſſeſſion without payment. But this caſe is widely different from that of *Lickbarrow* and *Maſon*, and is virtually the caſe of *Snee* and *Preſcot*. It was ingeniouſly put by the plaintiff's counſel, that there was an interval of five days, in which the plaintiff in this cauſe muſt be conſidered as the purchaſer of thoſe goods

goods for a valuable conſideration, without notice under a title, which was indefeazable. If the fact were ſo, to be ſure the conſequences which he ſtated would neceſſarily have followed; but during that interval the plaintiff was not in ſuch a ſituation, he had not then paid for the goods, and then he ſtood in the ſituation of the holder of a bill of lading without having paid for the goods; when, according to the opinion of Lord *Hardwicke*, in the caſe of *Snee* and *Preſcot*, he had no right to them as againſt the original conſignor. On this ground, therefore, I am of opinion, that the caſe of *Lickbarrow* and *Maſon* is not ſhaken by this determination; but on the very ground on which that caſe was decided, I think that the defendants in this caſe, had a right to detain theſe goods.

Aſhhurſt, J.—Although in general the conſignor of goods is entitled to ſtop them *in tranſitu*, in caſe of the inſolvency of the conſignee, if he has not been paid for them, yet that rule does not hold in caſe of an aſſignment of the bill of lading to a third perſon for a valuable conſideration, without notice; becauſe the poſſeſſion of the bill of lading by the conſignee, makes him the viſible owner of the goods, and would enable him to commit a fraud on a third perſon; ſuch was the caſe of *Lickbarrow* and *Maſon*. But it ſeems to me, that there are particular circumſtances in this caſe which diſtinguiſh it from that, becauſe it appears upon the contract made on the 21ſt of *March*, that the plaintiff made himſelf a complete partner with *Hague quoad* this tranſaction. And he not only made himſelf a partner, but by the terms of the contract, he made himſelf the paymaſter; therefore he put himſelf in the place of the original conſignee, and muſt take the bill of lading ſubject to the ſame rights. That being the caſe, it follows as a neceſſary conſequence, that the defendants

dants had a right to ſtop the goods *in tranſitu*. And it would be a very hard caſe if he had not that power, for the plaintiff has not in fact been deceived, ſince though *Hague* acted as the viſible owner, yet it appears on the agreement that he had not paid for them.

Buller, J.—It has been uniformly laid down in this court, as far back as we can remember, that good faith is the baſis of all mercantile tranſactions: and therefore it is material in queſtions of this kind to conſider whether the purchaſer has acted fairly and honeſtly, or with a deſign to deceive and defraud. The firſt caſe on this ſubject is *Snee* and *Preſcot*, and that has never been impeached in the ſmalleſt degree. But on the contrary, it has always been mentioned by the court with approbation. But ſtill it is to be remembered, that that caſe only relates to a tranſaction between the buyer and ſeller of the goods, and in the caſe of *Lickbarrow* and *Maſon*, it never was the intention of the court to uſe a ſingle expreſſion that could impeach that authority. If the tranſaction be between the buyer and ſeller of the goods, and the former has not paid for them, the latter has a right to ſtop them *in tranſitu*, in caſe of the inſolvency of the other. The caſe of *Snee* and *Preſcot* went no further than that; but in *Lickbarrow* and *Maſon*, and ſome other caſes, the court has been obliged to conſider whether in conſcience that rule ought to be extended to other parties, and they have held that it ought not, becauſe it would put it in the power of the conſignor to enable the conſignees to cheat an innocent third perſon. He who contracts on the faith and credit of the bill of lading ſhall not be diveſted of his right. But ſtill the criterion is, does the purchaſer take it fairly and honeſtly? On that principle the caſe of *Wright* and *Campbell* turned; there the court thought there was abundance of evi-

dence

dence to be left to a jury, to ſhew that the party who took the bill of lading had full notice that the goods had not been paid for. That circumſtance had ſlipped the attention of the learned Judge who firſt tried the cauſe, but on a motion for a new trial, the court thought that they ſaw reaſon to ſuſpect fraud between the factor and the third perſon to cheat the real owner of the goods. So in this caſe, if the plaintiff knew at the time that *Hague* had never paid for the goods, it was an agreement between thoſe two to obtain poſſeſſion of the goods without paying for them. And the fact of the plaintiff's knowledge appears on the face of the agreement itſelf. But there is ſtill another ground which would prevent the plaintiff's recovering in this action, for there is no doubt but that under this agreement the plaintiff and *Hague* were partners, and then the plaintiff could not recover in this form of action. That is like a caſe I argued many years ago, of *Fox* and *Hanbury*, where it was held that if one partner became a bankrupt, and the other partner afterwards diſpoſed of the goods and he then became a bankrupt, the aſſignees of both under a joint commiſſion, could not bring trover againſt the vendee of ſuch partnerſhip's effects. Now that applies to the preſent caſe. And on both grounds, I am of opinion, that the poſtea muſt be delivered to the defendants.

Groſe, J.—It never was my intention in the caſe of *Lickbarrow* and *Maſon* to throw the leaſt doubt on that of *Snee* and *Preſcot*, and other caſes which have held that the conſignor of goods may obtain the poſſeſſion of them before they reach the conſignee, who becomes inſolvent before payment. But in *Lickbarrow* and *Maſon*, a third perſon intervened. There a fair and *bonâ fide* purchaſer of the goods under a bill of lading differed that caſe from the others, which were only be-

tween the original parties. The only ground on which this caſe can be ſupported is, by likening it to *Lickbarrow* and *Maſon:* but I think it is totally unlike. I agree with the counſel for the defendants, in conſidering the money paid by the plaintiff to *Hague*, as in reality a loan to permit the plaintiff to enter into partnerſhip with him. If ſo, the plaintiff muſt ſtand in the ſituation of *Hague*, who knew the whole tranſaction, and that the goods were not paid for, and that he actually agreed to pay for them; ſo that he ſtands preciſely in the ſame ſituation as the original purchaſer of the goods. I agree alſo with my brother *Buller*, on the laſt point, the plain intention of that agreement was that the plaintiff and *Hague* ſhould become partners in the goods, and then one partner could not recover thoſe goods which the other could not. Poſtea to the defendants.

Ex Parte BUSH.

Mich. 1734. 7 *Vin. Abr.* 74.

Where an attorney had been employed by one who afterwards became bankrupt, and the aſſignees petitioned to have the papers delivered up, and that the attorney might come in for his demands *pari paſſu* with the other creditors, the Lord Chancellor ſaid the attorney had a lien upon the papers in the ſame manner againſt the aſſignees as againſt the bankrupt; and though it doth not ariſe by any expreſs contract or agreement, yet it is as effectual, being an implied contract by law. But he ſaid, that papers received after the bankruptcy could not be retained.

Ex Parte

Ex Parte ANDREWS.

21ſt June 1764.

Tolfrey a linen draper was in *October* 1763 indebted to *Andrews* a callico printer in 491 *l.* 10 *s.* for printing and other work done by him to divers parcels of cotton and linen for *Tolfrey*, and alſo for money paid and advanced to the collectors for the duty for part of the linens; and previous to the month of *October* 1763, *Tolfrey* delivered to *Andrews* cottons to be printed, which were accordingly done, and the expence of printing formed part of the debt of 491 *l.* 10 *s.* which ſum by certain payments and allowances, was reduced to 312 *l.* 2 *s.* 9 *d.* In *November* 1763, a commiſſion iſſued againſt *Tolfrey*. At the time he became bankrupt, he was indebted to *Andrews* in 312 *l.* 2 *s.* 9 *d.* for and upon account of printing cottons and linens. *Andrews* had linens then in his hands which belonged to the bankrupt and were delivered by him to *Andrews* to be printed, of the value of 107 *l.* 14 *s.* 3 d. *Andrews* had proved a debt under the commiſſion, to the amount of 204 *l.* 8 *s.* 6 *d.* being the amount of his debt, after deducting the 107 *l.* 14 *s.* 3 *d.* the computed value of the linens in his hands. *Andrews* applied to the aſſignees to redeem the linens and pay him the ſum of 107 *l.* 14 *s.* 3 *d.* which they declined, inſiſting on their parts that the linens ought to be delivered to them, upon paying *Andrews* the expences, which aroſe to him for printing thoſe particular cottons: *Andrews* on the contrary contended, that he had a lien upon the linens in his poſſeſſion, not only for the work done to them in particular, but alſo for former work done for the bankrupt of the like nature. He therefore petitioned to be at liberty to ſell the linens

linens for the beſt price that could be got for the ſame, and that he might pay himſelf out of the produce thereof, the ſum of 107 *l.* 14 *s.* 3 *d.* paying the overplus, if any, to the aſſignees; but in caſe the produce of the goods ſhould not be ſufficient to pay him the whole of his debt, then that he might be admitted a further creditor on the bankrupt's eſtate for the deficiency. Lord *Northington*, after hearing counſel, ordered that *Andrews* ſhould retain the value of the goods in his hands in part ſatisfaction of his debt, and that he ſhould be at liberty to prove the reſidue under the bankrupt's eſtate.

THOMSON *v.* COUNCEL.

1 *Term Rep.* 157.

On the 9th day of *July* 1785, *Nelſon* the bankrupt committed a ſecret act of bankruptcy.

On the 27th of *July*, he was ſurrendered in diſcharge of bail, to the cuſtody of the marſhal of the King's-bench.

On the 2d of *Auguſt*, a commiſſion of bankruptcy iſſued againſt him.

On the 5th and 6th of the ſame month of *Auguſt*, the bankrupt having a family of ſix children, applied to the defendant who was his ſiſter-in-law, to take out of his houſe, as much plate as would raiſe 20 *l.* for the maintenance of himſelf and family.

She borrowed 20 *l.* upon the plate, for the ſupport of the bankrupt and his family, all of which ſhe expended in the maintenance of the bankrupt and his family for the ſpace of fifty-five days, beſides advancing 14 *l.* more of her own money, for that purpoſe.

The

The defendant knew of the commiſſion of bankruptcy having iſſued, when the plate was taken from the bankrupt's houſe.

Upon a queſtion for the opinion of the court, whether the aſſignees were entitled to recover,

Lord *Mansfield* ſaid, This was a very cruel caſe, but if the aſſignees inſiſt upon their claim, this court cannot aſſiſt the defendant.

Buller, J.—Suppoſing the bankrupt ought to be maintained out of his effects, during his examination; yet the defendant cannot be juſtified in taking the property of *A.* to maintain *B.*

CHAP. XV.

Ex parte BURRELL.

22d July 1783.

Where there was a joint commiſſion againſt two partners, and a ſeparate one againſt one of them; the petitioners as aſſignees under the ſeparate commiſſion, petition to be admitted creditors under the joint commiſſion, for a ſum of money brought by their bankrupt into the partnerſhip beyond his ſhare, and as being therefore a creditor on the partnerſhip for that ſum. But refuſed, on the principle that he cannot be a creditor on the partnerſhip in competition with the joint creditors.

CHAP. XVI.

KRETCHMAN *v.* BEYER.

1 *Term Rep.* 463.

The defendant in error, having recovered a judgment againſt the plaintiff in the court of Common Pleas, the plaintiff brought a

writ of error which was duly iſſued, allowed and ſerved. Afterwards the defendant in error became a bankrupt, and his aſſignees ſued out a *ſcire facias quare executionem non*, reciting the recovery below and the writ of error.

Buller, J.—This *ſcire facias* is wrong either way. Firſt, as a *ſcire facias quare executionem non*, becauſe it appears from the recital that a writ of error is depending, and ſecondly as a *ſcire facias* to compel an aſſignment of errors, it is likewiſe wrong, even ſuppoſing it did not take notice of the writ of error depending; becauſe there has been a proceeding ſince the judgment. And the rule is that the aſſignees cannot make themſelves parties to the record in any intermediate ſtage of the proceeding, but it muſt be immediately after judgment, though an interlocutory judgment is ſufficient for that purpoſe. Here the aſſignees ſhould have gone on with the writ of error in the bankrupt's name till judgment. Therefore the *ſcire facias* muſt be quaſhed.

MASTERS *v.* DRAYTON.

2 *Term Rep.* 496.

In an action for uſury in taking more than legal intereſt on 500 *l.* from the 10th of *April* to the 20th of *October* 1786, tried at *Glouceſter* before *Heath*, J. to prove the uſurious contract, and taking, *Lightfoot* the borrower of the money was called. Upon the *voir dire* it appeared that he had not repaid the money, that he was a bankrupt and had not obtained his certificate, that the defendant was his aſſignee and had proved this debt under the commiſſion, whereupon the bankrupt, (the witneſs) offered a releaſe to the aſſignees of all intereſt, dividend,

dividend, profit, ſurplus, &c. &c. which might ariſe from the diſcharge of this debt, or from the increaſe of the fund by the deduction of it, and alſo a general releaſe of all claims whatever to allowance and ſurplus. It was then objected by the defendand's counſel, firſt that a certificate muſt be obtained before the bankrupt could be a witneſs, or the releaſe operate to make him one, and ſecondly, that the proſpect of obtaining a certificate by increaſing his fund, was an intereſt which rendered the witneſs incompetent; to which it was anſwered that if a certificate had been obtained, the releaſe would be unneceſſary, and that the proſpect of obtaining a certificate was only an influence which went to his credit and not to his competence: but the learned Judge being of opinion that the releaſe was only applicable to a debt due to the bankrupt, which he might releaſe, or at leaſt his ſhare or advantage in or from it, rejected the witneſs giving the plaintiff's counſel leave to take the opinion of the court upon that point, the plaintiff having been nonſuited. The court were of opinion that this objection rendered the witneſs incompetent, and that he could not be examined before he obtained his certificate, for notwithſtanding the defendant had proved his debt under the commiſſion which he may do for the very purpoſe of preventing a certificate, that was no objection to his bringing an action at law, and arreſting the bankrupt for the whole debt.

FRENCH *Assignee of* COX *againſt* FENN.

Trin. Term 1783.

An action brought againſt the defendant for money had and received to the uſe of the plaintiffs as aſſignees of *Cox*.

The defendant pleaded the general iſſue, and a verdict was found for the plaintiffs ſubject to the opinion of the court on the following caſe:

That on the 24th of *January* 1778, *Cox*, *Holford* and *Fenn*, agreed to purchaſe a row of pearls for an adventure in trade, and that *Fenn* ſhould advance the money. The agreement was, as follows: "*London*, 24th *January* 1778, *J. Cox*, "*J. Holford*, and *J. Fenn*, purchaſed a row of "pearls of *James L. Jeune*, for 2050 *l.* including "the commiſſion. The ſaid ſum was advanced "by *J. Fenn*, upon an agreement that profit and "loſs thereon ſhould be equally divided between "them in thirds; in conſequence of which we "the underſigned do hereby agree to pay two "thirds of the intereſt thereon, from the ſaid "24th of *January* 1778, till the ſaid row of "pearls are ſold. Signed by *Holford*, and *Cox*."

In *November* 1778, *Cox* became a bankrupt, after which the defendant ſent the row of pearls to *China*, where it was ſold for 6000 *l.* and the nett produce thereon being 5000 *l.* was remitted to the defendant.

Cox at the time of his bankruptcy, was indebted to the defendant in a much larger ſum than a third of the profits of this adventure.

The defendant in this action had pleaded *non aſſumpſit*, and given notice of ſet off, the queſtion for the conſideration of the court therefore was, whether he was entitled to ſet off the ſums owing to him from the bankrupt in bar of the action brought

brought by the bankrupt's aſſignees, for a third of the profits ariſing from the ſale of the pearls.

It was argued by *Davenport* and *Lee*, at different times for the plaintiff, and by *Baldwin* and *Wilſon*, for the defendant.

For the plaintiff it was inſiſted, that if theſe partners were part owners in a ſhip, and one of them became bankrupt, the third ſhare of the ſhip veſts in the aſſignees, and afterwards when the ſhip is ſold the aſſignees muſt be paid a third, and if he was privately indebted to the other partners it could not be ſet off.

Suppoſe theſe pearls had conſiſted of three of equal value, had not the aſſignees a right to one if they had been divided; then ſending them abroad afterwards and changing them into money can make no difference.

There is not any uſage which peculiarly decides this point.

In *Preſcot*'s caſe, 1 *Atk.* 230. the petitioner was a creditor of the bankrupt for 100 *l.* and 10 *l.* and a debtor to him on bond for 340 *l.* payable on the 4th of *March* 1756, with lawful intereſt, and applies that he may ſet off his demand of 100 *l.* againſt the principal and intereſt due on the bond, and not be obliged to prove his debt under the commiſſion, and take a dividend upon it only. The Lord Chancellor ſaid, though this is not in ſtrictneſs a mutual debt yet it is a mutual credit, for the bankrupt gives credit to the party in conſideration of the bond though payable at a future day, and he gives the bankrupt credit for the debt upon ſimple contract, and therefore it is a caſe within the equity of the 5 *G.* 2.

In the caſe *ex parte Deeze* 1 *Atk.* 228. it was determined that the purchaſer may retain goods till he is paid the price of packing, and if he has another debt due to him from the ſame perſon, the goods ſhall not be taken from him till he has

paid the whole, notwithſtanding the debtor is become a bankrupt.

None of the caſes that have been determined rule this. *Cox* at the time of his bankruptcy was indebted to the defendant in a much larger ſum, there was at that time no mutual credit at all, at the time he broke there was no mutual debt, no mutual credit, *Fenn* was the only creditor.

It is ſtated that the nett produce was remitted to the defendant without any conſent of *Cox* as far as it appears, and even without his knowledge.

There was no remittance till ſome years after the bankruptcy, ſo that the caſe excludes the poſſibility of *Cox* or any perſon ſtanding in his place, having at that time any demand upon *Fenn*.

The 5 *G.* 2. *c.* 30. *ſ.* 28. enacts that where there hath been mutual credit given by the bankrupt or any other perſon, or mutual debts between the bankrupt and any other perſon at any time before ſuch perſon became bankrupt, one debt may be ſet againſt another, and what ſhall appear to be due on either ſide on balance of ſuch account, and on ſetting ſuch debts one againſt another, and no more ſhall be claimed or paid on either ſide reſpectively.

The accounts by this ſtatute muſt be before the bankruptcy. This is the eſſential difference between this caſe and thoſe decided.

Fenn owed *Cox* nothing at the time of the bankruptcy. The very pearl was in *England* at that time.

The moment he became a bankrupt there was an entire ſtop put to all his affairs.

Could *Fenn* have gone before the commiſſioners and ſaid, I don't chuſe to prove this, becauſe there is an adventure between us, when the proceeds are remitted home I will retain my debts.

There was no credit, nor no idea of credit till long after the bankruptcy.

The ſtatute ſeems to make that event, a ſtop and a reſt in the affairs, beyond which nothing ſhould go on.

There is no caſe decided circumſtanced like this.

Had *Cox* any demand upon *Fenn*, at the time of buying the row of pearls?

Fenn could not have brought an action againſt any of them till the goods were ſold.

To allow this ſet off would be contrary to the words of the act.

The court on the ſecond argument ſtopped Mr. *Wilſon*, for the defendant, and Lord *Mansfield*, ſaid, the act of parliament is accurately drawn to avoid the injuſtice that would be done if the words were only mutual debts, and it therefore provides for mutual credit.

In this caſe credit is given to the defendant for a row of pearls, which is to belong in thirds to three perſons. As *Fenn* advanced the whole money, the other two were to pay him intereſt for their ſhares till the pearls were ſold; there is no doubt but there was a mutual credit. *Cox* had truſted him with the pearls, and he had truſted *Cox* with other goods, which in all probability he would not have otherwiſe done. This is the real juſtice of the caſe if there had been no bankruptcy, and the bankruptcy ought not to alter the real juſtice of the caſe.

Mr. Juſtice *Buller*.—Where there is a truſt between two men on each ſide, that makes a mutual credit.

The whole of the Solicitor's *(Lee)* argument goes to ſhew there are no words in the act but mutual debts, which is directly contrary to the fact.

On principle and juſtice there is no difference between this caſe and thoſe of *Preſcot* and *Deeze*.

The ſet off being allowed, the *poſtea* was ordered to the defendant.

GROVE *v.* DUBOIS.

1 *Term Rep.* 112.

In an action for money had and received by the defendant, to and for the uſe of the bankrupt before he became ſuch, and for money had and received to and for the uſe of the plaintiffs as aſſignees, to which the defendant pleaded the general iſſue *non aſſumpſit*, whereupon iſſue was joined.—The defendant alſo gave a notice of ſet-off for money had and received by the aſſignees for his uſe.

The cauſe came on to be tried at the ſittings after *Michaelmas* term 1785, before Lord *Manſfield*, at *Guildhall*, when the jury found a verdict for the plaintiffs, damages 375*l.* 16*s.* and coſts 1*s.* Subject to the opinion of the court on the following caſe:

That the bankrupt *John Liotard*, being an under-writer, ſubſcribed policies filled up with the defendant's name for his foreign correſpondents, who were unknown to the bankrupt.

The loſſes happened on the policies before the bankruptcy of *Liotard*, that the defendant paid the amount of the loſſes to his foreign correſpondents after ſuch bankruptcy.

That the defendant had a commiſſion *del credere* from his correſpondents, was made a debtor by the bankrupt for premiums, and always retained the policies in his hands.

The queſtion for the opinion of the court was, whether, "under the notice of ſet-off, or under "any of the ſtatutes reſpecting bankrupts, the "defendant

" defendant is entitled to ſet-off this account " with *Liotard*."

Lord *Mansfield*, J. C.—The whole turns on the nature of a commiſſion *del credere*. Then what is it? It is an abſolute engagement to the principal from the broker, and makes him liable in the firſt inſtance. There is no occaſion for the principal to communicate with the under-writer, though the law allows the principal for his benefit, to reſort to him as a collateral ſecurity. But the broker is liable at all events.

Buller, J.—I remember many actions brought at *Guildhall*, againſt the brokers, with commiſſions *del credere*, and I never heard any inquiry made in ſuch caſes, whether there had been a previous demand upon the under-writer and refuſal. And I can venture to ſay that ſuch is not the practice. It makes no difference at the time of making the policy, whether the under-writer knew the principal or not. He truſted to the broker, the credit was given to him and not to the other.

I agree that the notice of ſet-off is bad, but this loſs may be proved and ſet off under the general iſſue, by the 28th ſection of the 5 *Geo.* 2. *c.* 30. The words of that ſection are, " That " where it ſhall appear to the commiſſioners or the " major part of them, that there hath been mu- " tual credit given by the bankrupt and any " other perſon, or mutual debts between the " bankrupt, and any other perſon at any time be- " fore ſuch perſon become bankrupt, the ſaid com- " miſſioners, *&c.* ſhall ſtate the account between " them, and one debt may be ſet againſt another, " and what ſhall appear to be due on either ſide " on the balance of ſuch account, and no more " ſhall be claimed and paid on either ſide re- " ſpectively."

Therefore we ſee by this ſection of the ſtatute, that the aſſignees could legally claim no more than the balance upon the account between the parties. Judgment was given for the defendant.

BIZE v. DICKSON.

1 *Term Rep.* 285.

The bankrupt *John Rodolph Bartenſhlag* being an under-writer, ſubſcribed policies filled up with the plaintiff's name, for his foreign correſpondents who were unknown to the bankrupt.

Loſſes happened on ſuch policies to the amount of 665*l.* 9*s.* 7*d.* before the bankruptcy of *Bartenſhlag*, and were adjuſted by him. A loſs on another policy, to the amount of 6*l.* 3*s.* happened before the ſaid bankruptcy; but was not adjuſted till after ſuch bankruptcy.

The plaintiff paid the amount of the loſſes to his foreign correſpondents after ſuch bankruptcy.

The plaintiff had a commiſſion *del credere* from his correſpondents, was made debtor by the bankrupt, for the premiums, and always retained the policies in his hands.

A dividend of 10*s.* in the pound was declared under the ſaid commiſſion, on the 15th of *June* 1782.

At the time of the bankruptcy, there was due from the plaintiff to the bankrupt the ſum of 1356*l.* 0*s.* 3*d.* And there was due from the bankrupt, for the above loſſes 661*l.* 9*s.* 10*d.*

On the 15th of *March* 1782, the plaintiff paid to the defendants the ſum of 750*l.* and on the 17th of *November* 1785, the further ſum of 606*l.* 0*s.* 3*d.* amounting to 1356*l.* 0*s.* 3*d.* And on the 18th of *November* 1785, the plaintiff proved

proved the ſaid ſum of 661 *l.* 9 *s.* 10 *d.* under the ſaid commiſſion.

The plaintiff never received any dividend under the commiſſion, or on account of the ſaid loſſes.

A final dividend of the effects of the ſaid bankrupt was declared by the ſaid commiſſioners on the 24th day of *January* 1786.

On the 1ſt of *February* 1786, previous to ſuch dividend being paid, the plaintiff cauſed a notice to be ſerved on the defendants purporting that he had paid them the ſaid ſum of 1356 *l.* 0 *s.* 3 *d.* under a miſtaken idea, without deducting therefrom the ſaid 661 *l.* 9 *s.* 10 *d.* for the aforeſaid loſſes on the ſaid ſeveral policies, ſubſcribed by the bankrupt, for whom he was *del credere* to the ſaid foreign correſpondents, and had paid ſuch loſſes accordingly, and cautioning them againſt making any dividend, until he was paid the ſaid ſum of 661 *l.* 9 *s.* 10 *d.*

There is now in the hands of the ſaid defendants, effects of the bankrupt, more than ſufficient to ſatisfy the demand of the plaintiff.

The queſtion for the opinion of the court is, whether the plaintiff is entitled to recover in this action? if the plaintiff is entitled to recover in this action, the verdict to ſtand.—But if the court ſhall be of opinion that the plaintiff is not entitled to recover, then the verdict to be for the defendants.

Lord *Mansfield*, Chief J.—ſaid, the rule had always been that if a man had actually paid what the law would not have compelled him to pay, but what in equity and conſcience he ought, he cannot recover it back again, in an action for money had and received. So where a man has paid a debt, which would otherwiſe have been barred by the ſtatute of limitations, or a debt contracted during his infancy, which in juſtice he ought to diſcharge, though the law would not have

have compelled payment, yet the money being paid, it will not oblige the plaintiff to refund it; but when money is paid under a miſtake, which there was no ground to claim in conſcience, the party may recover it back again by this kind of action. Judgment was given for the plaintiff.

PARKER *and Others*, *v.* CARTER.

In C. P. *Trin.* 1788.

In an action for money had and received, to the uſe of the plaintiffs, as aſſignees of *Williams* a bankrupt. Upon a ſpecial caſe it was ſtated that the bankrupt directed an inſurance on three fourths of the ſhip *Providence* from *Portſmouth* to *Liverpool*. On the 3d of *December* 1782, the inſurance was effected and notice given to the bankrupt. On the 9th of *December* there was due on balance from the bankrupts to the defendants 302 *l.* On the 22d of *December* the bankrupt committed an act of bankruptcy. On the 30th of *December* the bankrupt wrote to the defendant ſtating his fear of being arreſted. On the third of *January* 1783, the defendant wrote an anſwer, but not material. On the 7th of *January* the bankrupt wrote a ſecond letter, ſtating further apprehenſion of arreſt. On the 9th of *January* news arrived that the ſhip *Providence* was captured and carried into *Breſt*. On the 14th of *January* the loſs was adjuſted by the under-writers, and paid to the defendants. On the 13th of *March* 1783, a commiſſion iſſued againſt *Williams*. The queſtion was whether the aſſignees could recover back from the defendants the ſum of money paid beyond what was due to them from the expences of the policy and inſurance. The defendants contended they had, as policy-brokers and

general

general agents of the bankrupt, a right to retain the whole money received from the under-writers, towards payment of the balance due to them, and not merely, as was contended, for the plaintiff for the charge of the insurance. And the court were of that opinion.

CHAP. XVII.

LEWIS *v.* PIERCY.

Term Rep. C. P. 29.

Insuring in the lottery, is not within 5 *Geo.* 2. *s.* 12. for on a rule to shew cause why the defendant who was in execution, should not be discharged out of custody on an affidavit, it appearing that the debt arose before he became a bankrupt, but that the verdict was obtained, and the costs taxed after the bankruptcy, though before his certificate was allowed. In arguing the case, it appeared that an application had been previously made to Mr. Justice *Gould* for a discharge, and that he directed the court to be moved on a suggestion of the attorney for the plaintiff, that the costs having accrued after the bankruptcy, made a new debt. *Kirby* argued that the costs were part of the original debt, and that as the defendant had obtained his certificate, his privilege extended to both. *Bouteflour* v. *Coats*, *Cowp.* 25. *Graham.* v. *Benton*, 1 *Wils.* 41. *Bond* did not argue it upon the point of the costs not being part of the original debt, but produced an affidavit, stating that within twelve months before the bankruptcy, the defendant lost 500 *l.* by insurance in the *English* and *Irish* lotteries, which he contended was gaming within the statute.——

Gould

Gould and *Wilſon* Juſtices, (Lord *Loughborough*, and *Heath* Juſtice not being in court,) ſaid, that the certificate ſeemed to them to extend to the coſts, as well as to the debt itſelf.

The court were clearly of opinion, that inſuring in the lottery was not gaming within the ſtatute, and made the rule abſolute for the defendant's diſcharge.

BIRD *v.* JONES.

Mich. 29 *G.* 3. B. R.

Jones had employed *Bird* who was an attorney, to recover a debt. *Bird* undertook the buſineſs and recovered the money, but as *Jones* alledged had not paid over to him the fair balance, and in 1788, he applied to the court of King's-bench, of which court *Bird* was an attorney, for the uſual rule of reference to the Maſter, on an undertaking to pay what ſhould appear due. *Bird* ſhewed cauſe, but the rule was made abſolute, after which, and before any proceedings upon it, *Bird* became bankrupt, and in 1788 obtained his certificate. A rule was now obtained to revive the former rules, but on ſhewing cauſe, the court diſcharged that rule, ſaying the certificate was a clear bar to the demand. They alſo ſaid, that after ſuch lapſe of time, the court would not proceed to give relief in a ſummary way. The party might proceed as he ſhould be adviſed.

MARTIN *v.* COURT.

2 *Term Rep.* 640.

In an action of debt on bond, dated the 6th *July* 1786, the defendant after craving oyer of the

the bond and of the condition, which was, (that if *Richard Frankcombe*, and *Charles Court*, or either of them, &c. ſhould pay the plaintiff or his executors, &c. 401 *l.* with lawful intereſt on the 4th of *July* 1787, without fraud or further delay, then the obligation to be void;) pleaded that before the exhibiting of the bill of the plaintiff, (*to wit*,) on the 19th of *April* 1787 at *Weſtminſter*, &c. he became a bankrupt within the true intent and meaning of the ſtatutes made and then in force concerning bankrupts, and that the cauſe of action, in the declaration mentioned, accrued to the plaintiff before the time when the defendant as aforeſaid became a bankrupt; whereupon iſſue was joined. At the trial before *Buller*, J. a verdict was found for the plaintiff, ſubject to the opinion of the court on the following caſe.

The plaintiff, the defendant, and one *Richard Frankcombe* entered into a bond to *William Leak* on the 5th of *July* 1786, conditioned for the payment of 401 *l.* and intereſt thereon, on the 5th of *July* 1787, being for the debt of the defendant; on the 6th of *July* 1786, the defendant entered into a bond with the condition ſtated in the plea, upon the back of which bond was endorſed the following memorandum. The within bond is given and executed by the within bounden *Richard Frankcombe* and *Charles Court*, to the within named *Henry Martin*, to indemnify him for having on the 5th day of *July* inſtant, at the requeſt of and for the proper debt of the within named *Richard Frankcombe* and *Charles Court* entered into and executed a joint and ſeveral bond to *William Leak*, for the payment of the ſum of 401 *l.* and intereſt, on the 5th of *July* 1787, dated the 6th of *July* 1786. The firſt money paid by the plaintiff on the original bond was on the 17th *Auguſt* 1787, the defendant became bankrupt on the 17th *April* 1787,

and

Gould and *Wilſon* Juſtices, (Lord *Loughborough*, and *Heath* Juſtice not being in court,) ſaid, that the certificate ſeemed to them to extend to the coſts, as well as to the debt itſelf.

The court were clearly of opinion, that inſuring in the lottery was not gaming within the ſtatute, and made the rule abſolute for the defendant's diſcharge.

BIRD *v.* JONES.

Mich. 29 *G.* 3. B. R.

Jones had employed *Bird* who was an attorney, to recover a debt. *Bird* undertook the buſineſs and recovered the money, but as *Jones* alledged had not paid over to him the fair balance, and in 1788, he applied to the court of King's-bench, of which court *Bird* was an attorney, for the uſual rule of reference to the Maſter, on an undertaking to pay what ſhould appear due. *Bird* ſhewed cauſe, but the rule was made abſolute, after which, and before any proceedings upon it, *Bird* became bankrupt, and in 1788 obtained his certificate. A rule was now obtained to revive the former rules, but on ſhewing cauſe, the court diſcharged that rule, ſaying the certificate was a clear bar to the demand. They alſo ſaid, that after ſuch lapſe of time, the court would not proceed to give relief in a ſummary way. The party might proceed as he ſhould be adviſed.

MARTIN *v.* COURT.

2 *Term Rep.* 640.

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and

and has ſince obtained his certificate; the queſtion is, whether the plaintiff is entitled to recover?

Aſhhurſt, J.—Said the plaintiff admitted himſelf to be the debtor of the obligee in the original bond for a particular purpoſe. He agreed to become a ſurety for the defendant, but he required to be indemnified at all events, and to have a ſecurity in his hands in caſe he ſhould be called upon; and this diſtinguiſhes it from the caſes where the bonds to indemnify were conditional, and the ſurety had not been damnified at the time of the bankruptcy. But this is an abſolute bond, payable to the plaintiff at all events, it was *debitum in præſenti, ſolvendum in futuro*, and therefore he might have proved it under the defendant's commiſſion.

Buller, J.—In the caſe of *Touſſant* v. *Martinnant*, though the plaintiff was only ſurety in the original buſineſs, yet it was apparent that he would not lend his name to the defendant generally, but only for a particular time; ſo here the plaintiff has acted on the ſame principle. The dates of the different bonds in the preſent caſe are deciſive: the original bond was made payable on the 5th of *July* 1787, but the bond in queſtion was made payable the 4th of *July*, which ſhews that the plaintiff inſiſted on having the money in his own hands, before he could be called upon on the other bond in which he had joined with the defendant. And, as it is abſolute in its form, and the plaintiff might have proved it under the commiſſion, he is barred in this action by the defendant's certificate.

Groſe, J.—There were two ways in which the plaintiff might have indemnified himſelf from the conſequences of having entered into the bond with the defendant; he might either have required that the money ſhould be placed in his hands, on a particular day before he could be called upon, or he might take a common

common bond of indemnity. If he had only taken the latter, this would have fallen within the caſe cited on the part of the plaintiff, but he was not contented with that, he inſiſted on having the money ſecured to him on the 4th of *July*, which was before the time when he could be called upon to pay the original bond; this bond then became a debt veſted at the time of the bankruptcy, which the plaintiff might have proved under the commiſſion.

JOHNSON *v.* SPILLER, *B. R.*

Hil. 24 *G.* 3. *Dougl. Add. p.* 13.

In an action for money had and received, money paid, money lent and on an account ſtated, the defendant pleaded his bankruptcy and certificate, and that the cauſe of action accrued before the bankruptcy. The trial came on at *Guildhall*, before *Buller* juſtice, at the ſittings after *Michaelmas* term 1783, when a verdict was found for the plaintiff, with 378 *l.* 15 *s.* 2 *d.* damages, ſubject to the opinion of the court, on a caſe reſerved, which ſtated; that on the 7th of *October* 1782, the plaintiff being in want of 1800 *l.* applied to the defendant to endorſe his (the plaintiff's) promiſſory note for that ſum, for the purpoſe of diſcounting it at the bank, and as a ſecurity or indemnity, the plaintiff depoſited in the defendant's hands, three ordnance debentures, with the uſual aſſignments thereon executed by the plaintiff, ſo as to render them negotiable, for which the following memorandum was ſigned, *viz.* "Received 4th of "*September* 1782, of Mr. *James Johnſon* three ord-"nance debentures, (ſpecifying them) amount-"ing to 2077 *l.* 4 *s.* 10 *d.* which I hold as a col-"lateral ſecurity for his note of hand to me,

"dated the 5th *Auguſt* at three months, for "1800 *l.* due the 8th of *November* next. *J. Spiller*, "*J. Johnſon.*" The note for 1800 *l.* was afterwards renewed, for the accommodation of *Johnſon* by another, dated the 7th of *October* 1782, payable in three months. On the 12th of *November* 1782, the defendant pledged one of the debentures for 779 *l.* 4 *s.* 2 *d.* with Meſſrs. *Tibbits*, as a ſecurity for 500 *l.* for which he alſo gave his note of hand, payable two months after date. On the 10th of *January* 1783, the plaintiff paid his renewed note of hand for 1800 *l.* to the bank, to whom the defendant had endorſed it. On the 18th of *January* 1783, the defendant became a bankrupt, and on the 29th of *March* following, obtained his certificate. On the 13th of *October* 1783, the plaintiff redeemed the debenture for 779 *l.* 5 *s.* 2 *d.* from Meſſrs. *Tibbits*, by paying 378 *l.* 15 *s.* 3 *d.* the remainder of the 500 *l.* having been received by them, as a dividend under the defendant's commiſſion.

Lord *Mansfield*.—This is a very plain caſe, *Johnſon* wanting money, prevails on *Spiller* to lend him his name, by endorſing his note to be diſcounted at the bank, giving him, as a ſecurity, this debenture, (among others,) and making it negotiable. This put it in the defendant's power to diſpoſe of it, and he pledged it with Meſſrs. *Tibbits*; afterwards on the 10th of *January* 1783, *Johnſon*'s note was paid at the bank; from that time *Spiller* became his debtor for money had and received, and was immediately liable in an action of aſſumpſit. This was before the bankruptcy; it was a debt which might have been proved under the commiſſion, and therefore it is diſcharged by the certificate.

Buller, J.—It is not to be taken for granted, that a demand in trover cannot be proved under a commiſſion of bankruptcy; where the demand

can be liquidated, it may. It is only perſonal damage, as for an aſſault, *&c.* that cannot be proved, but, here the plaintiff might have had a ſpecial action of aſſumpſit, as ſoon as the debenture was pledged. We are not to preſume the conſent of *Johnſon*. It was only depoſited with the defendant, to be kept as a ſecurity. As to the uncertainty of the demand in ſuch an action, would it have been more uncertain than the demand in a common action of aſſumpſit, on a *quantum meruit*, for goods ſold?

REX. *v.* EGGINGTON.

1 *Term Rep.* 369.

A man had received in his character as overſeer of the poor 4 *l.* previous to his bankruptcy, which was on the 5th of *December* 1785, but his accounts were not made out till the *Eaſter* following, but he had afterwards been committed to *Worceſter* goal, by two juſtices for not paying over the 4 *l.* as the balance of his accounts.

He applied to the court to be diſcharged out of cuſtody, having obtained his certificate.

Lord *Mansfield* ſaid, this money was depoſited in the defendant's hands, for the uſe of the pariſh, which they had no right to call for till a fortnight after *Eaſter* 1786, therefore till that time he was intitled to retain it. But this debt only ariſes from the defendant's converſion of it to his own uſe, which is not till after the bankruptcy. Therefore the defendant is not entitled to be diſcharged.

Buller, J.—This motion can only be ſuſtained on the ground that the pariſhioners had a cauſe of action againſt the defendant before his bankruptcy; but at that time they could not have ſued him for this debt. And even if this ſum had been

kept by itſelf, the bankrupt's aſſignees could not have touched it. The defendant was a mere truſtee for the pariſh, and I cannot think that his bankruptcy diſcharged him from his office of overſeer. Therefore he was not diſcharged.

CALLEN *v.* MEYRICK.

1 *Term Rep.* 361.

Thus upon a rule to ſhew cauſe why the execution which had been levied by the ſheriff, under a writ of *fieri facias*, ſhould not be ſet aſide, and the money levied under it reſtored to the defendant. The defendant had been declared a bankrupt; and his certificate had been ſigned by four parts in five, in number and value of the creditors, but not allowed, at the time the writ was executed. The debt exiſted previous to the bankruptcy. This application was made on the authority of *Graham* v. *Benton* where the bankrupt who had not obtained his certificate until after judgment was diſcharged out of execution on that judgment, and the caſe of *Bromley* v. *Goodere* was cited to ſhew that the operative force of a certificate ariſes from the conſent of the creditors; that the reaſon of an allowance by the Chancellor is to prevent ſurprize, and that the certificate, *when confirmed, has its effect from the beginning.*

Contra Tudway v. Bourne. 2 Bur. 716.

Afterwards, *Willes*, J.—ſaid that as it had been argued that the ſtat. 5 *Geo.* 2. *c.* 30. extended to executions againſt the goods as well as againſt the perſon of the bankrupt, and the caſe of *Graham* v. *Benton* had been cited in ſupport of it, the court had taken time to look into the ſubject; but on examination, that caſe was found to apply only to the diſcharge of the perſon; and that it would be directly contrary to the very

words of the ſtatute, to extend it to an execution againſt the goods of the bankrupt: and therefore the rule muſt be diſcharged.

BIRCH *v.* SHARLAND.

1 *Term Rep.* 715.

The defendant being in execution at the ſuit of the plaintiff; in *September* 1785, a commiſſion of bankruptcy iſſued againſt him, and he was declared a bankrupt. Soon after, in order to regain his liberty, he gave the plaintiff a bond and warrant of attorney to confeſs judgment for the old debt. That bond and warrant of attorney having been put in force, the defendant obtained a rule to ſhew cauſe why he ſhould not be diſcharged out of execution, having obtained his certificate, upon the ground, that the bond and warrant of Attorney were bad, no attorney on his behalf having been preſent when they were executed, or ſuppoſing they were valid, the debt might have been proved under the commiſſion.

Per Curiam. This is certainly to be conſidered in the light of a new debt, ariſing upon a new conſideration, becauſe the bond and warrant of attorney, were given in order to procure the defendant's liberty. The old debt was thereby extinguiſhed. That point was determined in the caſe of *Vigers* v. *Aldrich*, and in *Jacques* and *Withy*. This is the ſame as if a new promiſe had been given for the ſame debt upon the ſame conſideration, even after a certificate obtained which would operate as a new debt, becauſe the old debt ſtill remained in equity. And the rule was diſcharged.

CHAP. XVIII.

Ex parte NOCKOLD.

29th June, 1734.

A perſon became a bankrupt, and a commiſſion iſſued againſt him, and aſſignees were duly appointed, and a dividend of 6*s.* 1*d.* in the pound was ordered amongſt the creditors. It happened that one of the bankrupt's creditors who was intitled to 61*l.* as his proportion of the dividend was an inſolvent perſon, and he was indebted to the aſſignee, on account of being co-ſurety with him in ſome bonds which the aſſignee had paid off with his proper monies, and the aſſignee inſiſting that he had a right to retain in his hands the 61*l.* towards ſatisfying himſelf; the creditor thereupon preferred his petition to the Lord Chancellor, praying that he might be paid his ſhare of the dividend. On hearing the petition and counſel on both ſides, his lordſhip declared, that thoſe who were equally bound for a debt, ought equally to diſcharge it, and therefore he thought on the affidavit read, that the petitioner was indebted to the aſſignee as being a co-ſurety in a bond, which the aſſignee had ſolely diſcharged: and his lordſhip diſmiſſed the petition.

FINIS.

ADDENDA.

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